Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

STATE OF TEXAS, *ET AL.*,
Petitioners,

v.

CHERYL J. HOPWOOD, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the University of Texas School of Law have a compelling governmental interest in some limited consideration of race to remedy the present effects of past discrimination or to achieve reasonable ethnic diversity?

2. Can a court of appeals's issuance of "judicial instructions" in place of a formal injunction or declaratory judgment (a) insulate the decision from further review, or (b) support a substantial attorneys' fees award?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Respondents

Cheryl J. Hopwood
Douglas W. Carvell
Kenneth R. Elliott
David A. Rogers

Defendants-Petitioners

The State of Texas
The University of Texas Board of Regents
The University of Texas at Austin
The University of Texas School of Law
Patrick C. Oxford, A.W. Riter, Jr., Woody L. Hunt, Charles Miller, Rita Crocker Clements, A.R. Sanchez, Raul R. Romero, and Tom Loeffler, in their official capacities as members of the University of Texas Board of Regents
Donald L. Evans, in his official capacity as a former member of the University of Texas Board of Regents
Larry R. Faulkner, in his official capacity as President of the University of Texas at Austin
M. Michael Sharlot, in his official capacity as former Dean of the University of Texas School of Law
Stanley M. Johanson, in his official capacity as Professor of Law of the University of Texas School of Law

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PETITION FOR WRIT OF CERTIORARI

This case presents fundamental questions about the constitutionality of affirmative action in higher education. The Court should grant this petition because the decision of the court of appeals addresses issues of national significance for higher education on which the lower federal courts are in direct disagreement and exemplifies the lower courts' unsettled understanding of the Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), as well as the proper analysis for remedial, race-conscious state action. Since the Fifth Circuit issued its original *Hopwood* decision five years ago, the tension among the circuits has only increased and has resulted in irrational and unbearable variation in applicable law. The prevailing uncertainty is drawn into sharp relief by the fact that the sheer fortuity of a school's geographic location dictates the governing law on admissions criteria. Due to the great importance

of the issues to the country's public institutions of education, as well as to the larger arena of the States' use of racial classifications, petitioners request that the Court grant this petition.

OPINIONS BELOW

There have been three substantial opinions in the district court and three in the court of appeals, each styled *Hopwood v. Texas*. In the nomenclature adopted by the court of appeals, the three appellate opinions are *Hopwood I*, *II*, and *III*, respectively. The second and third opinions of the district court are *Hopwood A* and *B*, respectively. The first opinion in the district court received no short-form designation. The first opinion in each court dealt with unsuccessful motions to intervene and are not at issue in this petition. The two relevant sets of opinions are reported as follows:

> *Hopwood A*, 861 F.Supp. 551 (W.D. Tex. 1994) (Pet. App. 1a-72a), *rev'd*, *Hopwood II*, 78 F.3d 932 (CA5) (Pet. App. 73a-150a), *reh'g en banc denied*, 84 F.3d 720 (CA5) (Pet. App. 151a-162a), *cert. denied*, 518 U.S. 1033 (1996).
>
> *Hopwood B*, 999 F.Supp. 872 (W.D. Tex. 1998) (Pet. App. 163a-268a), *aff'd in part and rev'd in part*, *Hopwood III*, 236 F.3d 256 (CA5 2000) (Pet. App. 273a-318a). In an unreported order, the court of appeals denied both sides' petitions for rehearing en banc. Pet. App. 319a-321a.

JURISDICTION

The court of appeals entered judgment on December 21, 2000. It denied timely petitions for rehearing en banc on January 17, 2001. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

Title VI of the Civil Rights Act of 1964 provides:

> No person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d.

STATEMENT OF THE CASE

Respondents are unsuccessful applicants for admission to the University of Texas School of Law. They filed this action alleging that they were denied admission because of their race. The district court had jurisdiction under 28 U.S.C. §§1331 and 1343.

After an eight-day trial, the district court held that the law school's consideration of race in admissions served compelling interests in maintaining a diverse student body and in overcoming the effects of past discrimination by the law school and by other units of public education in Texas. *Hopwood A*, 861 F.Supp., at 569-73. The district court interpreted the law school's claims of compelling interest in light of the State's "affirmative duty to eliminate every vestige of racial segregation and discrimination in its educational system." *Id.*, at 571 (citing *United States v. Fordice*, 505 U.S. 717 (1992)).

Texas's system of public education, including the law school, has a long history of discrimination against minority students at all levels. *Id.*, at 554-57, 571-73. The State believes that it has rid itself of overt discriminatory practices, but vestiges of its past discrimination remain. The present effects of past discrimination

are especially evident in the racial identifiability of the pool of applicants who meet the demanding competitive admissions criteria at its most selective institutions of higher education, including the law school. For over twenty years, the Department of Education's Office for Civil Rights (OCR) has demanded that the university and the law school take affirmative, race-conscious measures to eliminate the current effects of past discrimination in Texas's public education system. *Id.*, at 556-57. OCR's enforcement actions were directed in part by orders of the United States District Court for the District of Columbia, which held in 1983 that Texas had not yet adopted a sufficient plan for desegregating higher education. *Id.*, at 556.

The district court found that many Texans in the pool of potential law students had attended segregated schools, and that "this segregation has handicapped the educational achievement of many minorities" and constricted the pool of qualified minority applicants to the law school. *Id.*, at 573. More than forty Texas school districts remained under judicial supervision in desegregation litigation when this case was tried in 1994 (and when the law school class of 2016 entered kindergarten). *Id.*, at 554.

The district court also found that the legacy of the law school's own segregation continued to shape minority attitudes toward the law school, as evidenced by the racial identity of the applicant pool and the reluctance of minority applicants to accept offers of admission. *Id.*, at 572-73. The law school was segregated *de jure* for many decades, *see Sweatt v. Painter*, 339 U.S. 629 (1950), and then segregated *de facto* by its rising admission standards. The law school's first experiments with affirmative action admitted too many weak students and were abandoned. *Hopwood A*, 861 F.Supp., at 557. The immediate consequence of abandoning affirmative action was that in 1971, the law school's entering class of more than 500 students contained *zero* blacks. *Id.*, at 558, 573 n.66.

Beginning in the 1970s, the law school developed admissions procedures designed to remedy the effects of past discrimination and enhance the diversity of the student body while preserving highly selective criteria for admission. Details of the plan changed from year to year, but the law school consistently sought to admit additional black and Mexican-American students who were well-qualified but would not otherwise be admitted to the law school. *Id.*, at 557-63, 582 n.87. Over time, as the pool of minority applicants became stronger, the law school gradually reduced its reliance on racial preferences. *Id.*, at 560 n.18, 575 & n.69. "The applicants selected for admission come from a relatively narrow band within the full range of scores." *Id.*, at 563. Preferring minorities within that band substantially increased minority enrollment with negligible impact on the academic strength of the class as a whole and only modest impact on any other applicant's individual chances for admission.[1]

The district court found that eliminating all consideration of race in admissions would lead directly to "resegregating the law school," and to a large majority of Texas minority law students attending Texas Southern University, the "separate-but-equal" law school created by Texas in the 1940s to avoid desegregation. *Id.*, at 573 & n.66; *see Sweatt*, *supra*. The district court also found substantial educational benefits from racial and ethnic diversity in law school classrooms. *Hopwood A*, 861 F.Supp., at 571. Based on these findings, and on this Court's judgment in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the court held that considering race in admissions served compelling interests in remedying the effects of past discrimination and in achieving educational diversity.

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[1] *See Hopwood B*, 999 F.Supp., at 886 n.29 (setting out testimony and data showing small anticipated increases in admission rates for nonpreferred applicants in the absence of affirmative action).

The district court invalidated certain details of the law school's 1992 admissions program, holding that the school's procedures were not narrowly tailored to serve the identified compelling interests. *Hopwood A*, 861 F.Supp., at 578-79. The law school had already corrected these features of its program, *id.*, at 582 & n.87, and did not appeal this aspect of the district court's decision. Plaintiffs appealed the district court's denial of their request for an injunction prohibiting all consideration of race.

The court of appeals reversed, forbidding "*any* consideration of race" in admissions, *Hopwood II*, 78 F.3d, at 948 n.36 (emphasis added), "even as part of the consideration of a number of factors," *id.*, at 946, 962. The court of appeals did not overturn the district court's findings on any of the facts summarized in this petition; instead, it rejected the relevance of those facts. The court of appeals held that the law school may remedy only its own discrimination, and that discrimination against minority applicants by other public education entities in Texas is mere "societal discrimination," beyond the State's power to address with race-conscious means. *Id.*, at 949-52. The court also concluded that the principal continuing effects of past discrimination by the law school—the limited number of minority applications, the resulting low minority matriculation rate, and the law school's reputation in the minority community—are irrelevant and cannot justify even limited consideration of race in admissions. *Id.*, at 952-54. The court further held that the law school's interest in racial and ethnic diversity is irrational, *id.*, at 945, and that its constitutional duty to eliminate all vestiges of past discrimination is irrelevant to this case, *id.*, at 954-55.

The court of appeals relied heavily on contract set-aside cases such as *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and employment cases like *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), while rejecting the relevance of the Court's higher education cases. The court refused to follow *Bakke* because

there was no majority in that case for any single governmental interest justifying affirmative action and because the court of appeals believed that *Bakke* had been implicitly overruled by subsequent decisions. *Hopwood II*, 78 F.3d, at 944-45. The court of appeals rejected the relevance of *United States v. Fordice*, 505 U.S. 717 (1992), holding that *Fordice* did not modify earlier cases such as *Croson*, and that the duty to eliminate all vestiges of segregation in higher education means only that the law school may address the (narrowly defined) effects of its own past discrimination—not that it may or must address the effects of discrimination by other actors in the Texas educational system. *Hopwood II*, 78 F.3d, at 955.

The court of appeals issued a detailed "judicial instruction" to defendants:

> [I]t is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction to the effect that it may not do so for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.

Id., at 958. It followed the instruction with the threat of "actual and punitive damages" if the law school did not comply. *Id.*, at 959. Yet it declined to order that defendants be enjoined, "as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion." *Id.*, at 958. After the closely divided court denied rehearing en banc, Pet. App., at 151a-162a, this Court denied certiorari. 518 U.S. 1033 (1996).

After a four-day second trial on remand, the district court enjoined the law school from any consideration of race in

admissions. *Hopwood B*, 999 F.Supp., at 923. The district court found that none of the plaintiffs would have been admitted to the law school under a race-neutral system of admissions, but awarded $704,000 in attorney's fees after awarding only nominal damages. *Id.*, at 901, 923-24. Both sides appealed.

The court of appeals affirmed the denial of actual damages. *Hopwood III*, 236 F.3d, at 263-72. It repeated and reaffirmed its earlier "judicial instruction" prohibiting any consideration of race in law school admissions, *id.*, at 273-74, and concluded that *Hopwood II* did not squarely contradict any decision of this Court, and thus was not "dead wrong." *Id.*, at 272-76.

The court of appeals reversed the injunction against any consideration of race, but primarily on procedural grounds. It remanded for findings of fact and conclusions of law explaining the necessity of the injunction. *Id.*, at 276-77. The court also decided that by prohibiting any consideration of race, the injunction went beyond *Hopwood II*'s "judicial instruction" forbidding consideration of race for any of four stated reasons. *Id.* But because the four reasons encompassed all the reasons why the law school might consider race in admissions, and were plainly so understood in both *Hopwood II* and *Hopwood III*, there was no practical difference between the court of appeals's "judicial instruction" and the district court's injunction.

With the reversal of the injunction, plaintiffs were left with no actual damages, no order of admission, and no formal injunction or declaratory judgment controlling the future behavior of the law school. Even so, as a practical matter the court of appeals's "judicial instruction" ended all consideration of race in the law school's admissions decisions by direct judicial order, and by its deterrent effect eliminated all consideration of race in admissions or financial aid anywhere in public higher education in Texas. Based on that, the court of appeals held that plaintiffs had achieved

prevailing-party status with *Hopwood II* and affirmed the substantial award of attorneys' fees. *Id.*, at 277-78.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. The Conflict with *Bakke*. The court of appeals's blanket prohibition of any consideration of race in admissions conflicts with the only clear holding of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Bakke* is the Court's only decision on the merits of affirmative action in higher education, and it directly controlled this case. Although *Bakke* was a fractured decision, a majority of the Court united in one clear holding (in Part V(C) of the lead opinion) that universities may take race into account in admissions:

> "In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed." *Id.*, at 320 (opinion of the Court per Powell, J.).

See also id., at 328 (opinion of Brennan, J., joining in Part V-C of Justice Powell's opinion). That is the holding in *Bakke*, and the Court has never overruled it. *Bakke* reversed an injunction, substantially identical to the "judicial instruction" issued by the court of appeals in this case, that prohibited any consideration of race in admissions. Because members of the *Bakke* majority relied on different justifying compelling interests, the court of appeals refused to follow *any* of *Bakke*'s rationales, and thus refused to abide by the Court's judgment.

Unable to distinguish *Bakke* on the facts, the court of appeals openly rejected *Bakke*'s authority as law. *Hopwood II*, 78 F.3d, at 944-45; *see also Smith v. Univ. of Washington*, 233 F.3d 1188, 1200 n.9 (CA9 2000) (noting conflict with *Bakke*), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Feb. 21, 2001) (No. 00-1341); *Wessmann v. Gittens*, 160 F.3d 790, 795 (CA1 1998) (same); *Gratz v. Bollinger*, 122 F.Supp.2d 811, 820-21 (E.D. Mich. 2000) (same). And in *Hopwood III*, even with the passage of time for reflection, the court of appeals declined to reconsider the first panel's disregard of *Bakke*. 236 F.3d, at 274-75. Now district courts have also begun to hold that *Bakke* is not authority they are bound to respect. *See, e.g., Grutter v. Bollinger*, No. 97CV75928-DT, 2001 WL 293196, at *45 (E.D. Mich. Mar. 27, 2001) (enjoining consideration of race in admissions to University of Michigan Law School); *Johnson v. Board of Regents of Univ. Sys. of Ga.*, 106 F.Supp.2d 1362, 1367-69 (S.D. Ga. 2000) (invalidating consideration of race in admissions to University of Georgia); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 32 F.Supp.2d 619, 628-29 (W.D.N.Y. 1999) (relying on *Hopwood II* and rejecting racial diversity of student body as legitimate governmental interest), *rev'd*, 212 F.3d 738 (CA2 2000).

The Fifth Circuit has put the status of *Bakke* in controversy. *See, e.g., Hopwood II*, 78 F.3d, at 944-45 ("[T]he *Bakke* Court did not express a majority view and is questionable as binding precedent."). If *Bakke* is still good law, this Court must say so. If *Bakke* is to be modified or overruled, *only* this Court can say so. Whatever the ambiguities of the opinion, and whatever seemingly discernible hints may have followed in subsequent decisions on affirmative action in other contexts, *Bakke* is the decision that most directly governs affirmative action in education, and the lower courts remain bound by it until the Court expressly says otherwise. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

B. The Conflict in the Lower Courts over Diversity. By refusing to respect the authority of *Bakke*, the Fifth Circuit has also brought itself into square conflict with other circuits. In *Smith v. University of Washington Law School*, the Ninth Circuit held that *Bakke* is good law, that diversity is a compelling interest in higher education, and that "a properly designed and operated race-conscious admissions program" at the University of Washington's law school would not be in violation of Title VI or the Fourteenth Amendment. 233 F.3d, at 1201. Both the Fifth and Ninth Circuits expressly recognized their conflict. *See id.*, at 1200 n.9 ("We acknowledge that *Hopwood [II]* decided to the contrary."); *Hopwood III*, 236 F.3d, at 275 n.66 ("We respectfully disagree . . . with the Ninth Circuit's holding that Justice Powell's diversity rationale is binding Supreme Court precedent.").

The division in the lower courts is further evidenced by courts' disagreement with the Fifth Circuit's holding that consideration of race is limited to remedial interests. *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752-53 (CA2 2000) (reduction of racial isolation resulting from *de facto* segregation can be compelling interest, even when not caused by school district); *Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061 (CA9 1999) (recognizing as a compelling state interest the operation of a research-oriented elementary "lab" school aimed at improving urban education); *Wittmer v. Peters*, 87 F.3d 916, 919, 921 (CA7 1996) (holding effective management of prison boot camp compelling governmental interest, justifying race-conscious hiring); *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 906-07 (CA3 1984) (upholding voluntary race-conscious teacher assignments in light of school system's *de facto* segregation); *Gratz v. Bollinger*, 122 F.Supp.2d 811, 816-24 (E.D. Mich. 2000) (rejecting *Hopwood II* and finding that diversity in higher education is a compelling interest that can justify narrowly tailored consideration of race in admissions). It remains true that "[i]n the education context, *Hopwood* is the only appellate court to have

rejected diversity as a compelling interest." *Wessman*, 160 F.3d, at 795; *see also Brewer*, 212 F.3d, at 748 ("the Fifth Circuit is the only circuit since *Bakke* to hold that a non-remedial state interest, such as diversity, may never justify race-based programs in the educational context"); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704 (CA4 1999) ("The only circuit to hold that diversity is not a compelling interest is the Fifth"), *cert. dismissed*, 529 U.S. 1050 (2000).

Some circuits have avoided the head-on conflict by opting not to rely on the lack of a compelling interest and considering instead whether States have narrowly tailored their programs to a presumed interest. *See, e.g., Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123, 130 (CA4 1999) (noting that "whether diversity is a compelling interest remains unresolved, and in this case, we also choose to leave it unresolved"); *Wessman v. Gittens*, 160 F.3d 790, 796 (CA1 1998) (concluding that it "need not definitively resolve this conundrum today" and deciding case on alternative grounds); *Lutheran Church-Mo. Synod v. F.C.C.*, 141 F.3d 344, 354, 356 (CADC 1998) (commenting that it did "not think diversity can be elevated to the 'compelling level'" but striking down challenged regulation on narrow-tailoring grounds). This approach has inevitably led to extensive analysis of factual matters to ascertain whether a classification is narrowly tailored, while governmental purposes go unexamined and States remain without guidance on proper compelling interests.

In rejecting the law school's diversity interest, the court of appeals relied on decisions by the Court that say next to nothing about education, and that do not undermine *Bakke*. The court of appeals did not appropriately consider either the Court's deference to education officials' design of academic policy, *see, e.g., Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), or the special significance diversity takes on in the school setting. As the Court

put it in *Brown v. Board of Education*, education is "the very foundation of good citizenship" and "a principal instrument in awakening the [student] to cultural values." 347 U.S. 483, 493 (1954). Diversity is a critical tool for schools in their function as "an assimilative force by which diverse and conflicting elements in our society are brought together on a broad but common ground . . . inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (quotations and citation omitted); *see also Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) (expressing similar view). Such benefits are simply lacking and often impossible in other contexts, such as broadcasting, employment, or industry contracting. In the school setting, by contrast, people from different backgrounds are intermingled in a learning environment. As Justice Powell made the common-sense recognition in *Bakke*, "the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S., at 313 (opinion of Powell, J.) (quotation and citation omitted).

The academic benefits of a student body representing differing ideas, values, backgrounds, and life experiences are widely recognized. *See, e.g., Sweatt*, 339 U.S., at 634 ("The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts."); *Gratz*, 122 F.Supp.2d, at 822-23 (reviewing expert evidence of racial diversity's contributions to school and students). The court of appeals inappropriately and bluntly applied the Court's conclusions regarding the financial windfall of contract set-asides to the *Bakke* benefits of an enriched academic life.

C. The Conflict over Remedying Past Discrimination and Preventing Racial Identifiability. The Court has recognized a State's interest in remedying past discrimination. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions."); *United States v. Paradise*, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting) (stating that there is "a compelling interest in remedying past and present discrimination"). Yet the court of appeals's severe limitations on the law school's remedial use of race strictly limited the State's ability to accomplish that interest. *Hopwood II* confined its inquiry into past discrimination to the acts of a single academic department and held that discrimination in public education in earlier years of a student's life is mere societal discrimination that the law school must ignore. 78 F.3d, at 949-52. That decision squarely conflicts with *Geier v. Alexander*, 801 F.2d 799 (CA6 1986), in which the Sixth Circuit upheld consideration of race in admissions to the University of Tennessee Law School:

> "Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted, they ordinarily must have been students for sixteen years . . . . The consent decree in this case does not seek to remedy some amorphous 'societal' wrong. It is directed solely at the continuing effects of past practices that adversely affected black Tennesseans as they moved through the public school systems and the higher education systems of the state." *Id.*, at 809-10.

For the first time in American history, a formerly segregated state institution has been prohibited from any ameliorative consideration of race in attempting to remedy past discrimination in the State's public education system. The judgment below is thus in substantial tension with *United States v. Fordice*, 505 U.S. 717 (1992), which clearly emphasized that the inquiry must extend to

the whole state: "*[T]he State* of Mississippi had the constitutional duty to dismantle the dual school system that its laws once mandated. . . . Thus we have consistently asked whether existing racial identifiability is attributable to *the State* . . . ." *Id.*, at 727-28 (emphasis added).

The Fifth Circuit's holding that the State is confined to race-neutral admissions policies in its efforts to remedy the present effects of past discrimination and to prevent *de facto* resegregation of the law school is also at odds with *Fordice*:

> "We do not agree . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely [illegible]ndoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system." *Id.*, at 729.

For similar reasons, the judgment below conflicts with *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (CA2 2000), which expressly rejected *Hopwood II* and held that elimination of *de facto* segregation is a compelling interest that can justify consideration of race in admissions, even when the school has no past history of *de jure* segregation. 212 F.3d, at 745-46, 752-53.

Petitioners believe that the State's interest in affirmative action is at its zenith in selective and formerly segregated institutions of higher education, and that the education cases are thus far more relevant than cases on contract set-asides and other contexts. But the judgment below conflicts even with some portions of the Court's opinions rejecting contract set-asides on the basis of race. Justice O'Connor's opinion in *Croson* rejected the claim that a city is required to "limit any race-based remedial efforts to eradicating the effects of its own prior discrimination." 488 U.S., at 486 (plurality opinion). Instead, the Justices took the broad view that if a "city could show that it had essentially become a 'passive

participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." *Id.*, at 492. In other words, they concluded that a governmental actor even less culpable than the law school could act to remedy the effects of racial discrimination.

Struggling to reconcile the *Croson* opinion with *Hopwood II*'s holding that the law school must ignore the effect of past discrimination in Texas public education on its applicant pool, the court of appeals in *Hopwood III* reached a remarkable conclusion: the law school could have considered race for remedial purposes if it had been a *passive* participant in *private* discrimination, *see Croson*, 488 U.S., at 492, but it was barred from using race because it had instead been an *active* participant in *governmental* discrimination. 236 F.3d, at 274 & n.61. Despite *Hopwood III*'s attempted distinctions, the decision conflicts with *Croson*. By improperly narrowing the scope of possible past discrimination to be remedied, the court of appeals simply refused to consider the law school's evidence of the present effects of past discrimination.

D. Conflicts—In Sum. The Court's long silence on consideration of race in higher education has left conflict and confusion in the lower courts. Various conflicts on specific issues comprise a deeper conflict on the basic question of the constitutionality of affirmative action in higher education, and this case presents the most critical issues of that conflict. At least in the context of a formerly segregated state educational system, the absence of reasonable racial diversity is a form of racial identifiability. Racial identifiability is a measure of segregation and often a consequence of past discrimination, particularly in an educational system that was once segregated *de jure* into two completely separate and unequal educational systems. Diversity, past discrimination, and desegregation are doctrinally distinct, but

they necessarily coexist in the context of a formerly segregated system.

In *Bakke*, the Court held that compelling interests in diversity, or in remedying past discrimination, or at least in the two combined, can justify some consideration of race in professional school admissions. In *Fordice* and other desegregation decisions, the Court took a broad view of the States' authority and responsibility to address the present effects of past *de jure* segregation. The Fifth Circuit took an extraordinarily narrow view of both *Bakke* and *Fordice*, putting itself in conflict with this Court and other circuits. Confusion and conflict now reign with respect to what a State *may* do to cure the effects of past discrimination and achieve reasonable racial diversity. The Court should grant certiorari to begin resolving these conflicts.

II. THIS CASE PRESENTS A CONSTITUTIONAL ISSUE OF GREAT NATIONAL IMPORTANCE.

There is consensus that the issues in this case are of national significance. *See Hopwood*, 518 U.S., at 1033 (Ginsburg, J., concurring in denial of writ of certiorari) (stating that "[w]hether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance"); *Smith v. University of Wash.*, No. 00-1341, Pet. for Cert., at 2 (Feb. 21, 2001) (asserting that whether achievement of a diverse student body is a compelling governmental interest is "issue of profound national importance"); *Texas v. Hopwood*, No. 95-1773, Br. for the United States as Amicus Curiae Supporting Petitioners, at 10 (stating that the case "raises issues of national importance that call for this Court's review"). The future of *Bakke* has obvious importance to both public and private colleges and universities across America, and the current inconsistency among the circuits in the law governing admissions programs confirms the continuing national significance of the issues.

The issue is even more important in those States that once operated *de jure* segregated systems of higher education. Sixteen States were sued under Title VI in the long-running *Adams* litigation in the District of Columbia. *See Hopwood A*, 861 F.Supp., at 555-56. These States now operate under a variety of judicial decrees and desegregation plans negotiated with the executive branch, all designed to eliminate racially identifiable institutions of higher education. The judgment below conflicts with many of those plans, and questions about the relationship of affirmative action to desegregation continue to be of profound importance throughout the South.

Hopwood II's effect on racial identifiability was swift and dramatic. In the first class admitted subsequent to that decision, the law school enrolled four black students and 26 Mexican-American students in a class of about 500—one-tenth the number of blacks and fewer than half the number of Mexican-Americans as had enrolled in 1992. *See Hopwood A*, 861 F.Supp., at 554 n.67; Mary Ann Roser, *UT Law School Recoups Some Minority Losses*, AUSTIN AMERICAN-STATESMAN, Aug. 26, 1998, at B1. Massive recruiting efforts have raised those numbers somewhat, to 18 blacks and 34 Mexican-Americans in the 2000 entering class of roughly 500 students, but the law school remains substantially racially identifiable in a State that is more than 40% black and Mexican-American. *See Texas Journal*, WALL ST. J., Sept. 6, 2000, at T1; Texas Comptroller of Public Accounts, Population Forecasts for Texas Counties by Race/Ethnicity 1990-2030, http://www.cpa.-state.tx.us/cgi-bin/poppgm (2000).

The law school has been forbidden to admit highly qualified minority students who approach or approximate but do not exceed the ever-rising threshold for admission in each year's competitive admissions process. It is prohibited from considering race even within the narrow band of academic credentials from which most students are admitted. Many of the brightest minority law students

are wooed to law schools in other States by strong minority admissions and financial aid programs, which remain constitutional elsewhere.

Other consequences of the judgment below are less obvious but equally drastic. The legal and rhetorical force of this Court's desegregation opinions helped make it constitutionally, politically, and socially unacceptable for selective public institutions to be overwhelmingly white. Carefully limited affirmative action plans were the one effective mechanism that enabled selective public universities to pursue the highest academic standards and also achieve some degree of racial diversity.

Now, institutions of higher education have resorted to alternative means in an effort to retain diversity's contributions for their schools. The Texas Legislature responded to *Hopwood II* with well-intentioned legislation that unavoidably has the effect of lowering undergraduate admission standards. TEX. EDUC. CODE §51.803 guarantees admission to any public university in Texas to any student who graduates in the top ten percent of his Texas high school class, without regard to test scores or high school curriculum. And TEX. EDUC. CODE §51.805(c) directs Texas universities to consider "all of, any of, or a combination of" eighteen admissions factors, mostly having nothing to do with academics, in the hope that some of these factors will turn out to be proxies that increase the number of minority students. The University of California, under similar pressure because of state-law prohibitions on considering race, has guaranteed admission to any student in the top four percent of his high school class, and its President has proposed ending the use of the Scholastic Aptitude Test. *See* Diana Jean Schemo, *Head of U. of California Seeks to End SAT Use in Admissions*, N.Y. TIMES, Feb. 17, 2001, at A1; Kenneth R. Weiss, *UC Minority Applications Surge*, L.A. TIMES, Jan. 31, 2001, at B1. Likewise, in the Michigan Law School case, to prevent substantial declines in minority enrollment, the district

court suggested "decreasing the emphasis for all applicants on the undergraduate GPA and LSAT scores, using a lottery system for all qualified applicants, or a system whereby a certain number or percentage of the top graduates from various colleges and universities are admitted." *Grutter*, 2001 WL 293196, at *26.

The essence of these approaches is to abandon the pursuit of academic excellence. The law school's interest in avoiding racial identifiability is compelling in itself; it is also inextricably linked to the law school's compelling interest in maintaining the highest possible academic standards. For the last two decades, institutions of higher education have relied on *Bakke* to include race among their considerations in composing student bodies. Wholly eliminating that practice would change the face of American higher education. Whether federal law requires that momentous step is a question of great importance—all the more so in a formerly segregated institution—that should be reviewed by the Court.

III. THIS CASE SQUARELY PRESENTS IMPORTANT ISSUES THAT ARE NOT SQUARELY PRESENTED IN OTHER HIGHER EDUCATION CASES.

Over 25 years ago, the Court remarked in dismissing as moot a case regarding the proper use of race in law school admissions that "there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court." *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974). Such a case has had a long-awaited arrival, and academic institutions and the States need guidance from the Court to design their admissions programs constitutionally and put an end to the public doubt, educators' unease, and attacks on various admissions programs. The need for resolution by the Court will not abate, but instead will intensify as these lawsuits proliferate and schools struggle to find fair and acceptable alternatives to race-conscious admissions.

Other pending cases present *some* of the issues presented in this case. Several pending cases present the important question whether diversity in higher education is a compelling governmental interest. But for now, and for some time to come, only this case squarely presents the equally important issue of whether remedying the effects of past discrimination is a compelling interest in the context of admissions to higher education.

Smith v. University of Washington Law School, No. 00-1341, presents the diversity issue. But Washington's educational system was never *de jure* segregated, and no issue of past discrimination is presented either in the petition or in the opinion below. At the very least, the Court should hold this case if it grants in *Smith*. If *Smith* is affirmed, the "judicial instruction" in this case would have to be reversed. But if *Smith* is reversed, or if the *Smith* petition is denied, important issues in this case would remain to be decided.

The University of Michigan cases, now pending in the Sixth Circuit, present the spectacle of conflicting decisions within the same campus. *See Grutter v. Bollinger*, 2001 WL 293196 (E.D. Mich. Mar. 27, 2001); *Gratz v. Bollinger*, 122 F.Supp.2d 811 (E.D. Mich. 2000); *Grutter v. Bollinger*, No. 01-1447, 2001 WL 327822 (CA6 Apr. 5, 2001) (granting a stay). But they too present only some of the important issues presented here. The university has defended each case on the ground of diversity, but it has not defended either case on grounds of past discrimination or desegregation. *Gratz*, 122 F.Supp.2d, at 816 n.5; *Grutter*, 2001 WL 293196, at *11-*12.[2] The same is true in the University of Georgia

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[2]Intervenors have raised issues in the Michigan cases that the *Grutter* court described as involving "societal discrimination." The *Grutter* court rejected the arguments, *see* 2001 WL 293196, at *42 ("[T]here has been no evidence, or even an allegation, that the law school or the University of Michigan has engaged in racial discrimination."), and similar issues raised by intervenors in *Gratz* are still pending in the district court. 122

case. *Johnson v. Bd. of Regents of Univ. Sys. of Ga.*, 106 F.Supp.2d 1362, 1369 & n.5 (S.D. Ga. 2000) (stating that Georgia makes "no . . . claim" that its affirmative action efforts are "necessitated by the lingering effects of past discrimination") (quotation omitted).

The issues presented here are of critical importance to higher education in Texas, yet they cannot again arise in Texas—because the State's entire educational system is complying with the court of appeals's "judicial instruction." To do otherwise involves the risk of large litigation costs, substantial liability for attorneys' fees, the actual and punitive damages threatened in *Hopwood II*, and the opprobrium of a state institution defying a clear directive from the federal courts. It has taken this case nine years to get here; the Court should not lightly assume that some other case, not yet pending, will soon be filed in some other southern state, that it will be fully litigated, that it will develop all the issues raised in this case, that those issues will be presented on the basis of a detailed record from twelve days of trial, and that it will reach this Court in a timely fashion. The issues presented are important, they are well developed, and they should be decided now.

IV. THE COURT OF APPEALS'S JUDICIAL PROHIBITION OF ANY CONSIDERATION OF RACE IN ADMISSIONS SHOULD NOW BE REVIEWED.

This Court denied a petition for certiorari in this case five years ago, with two Justices noting that the Court needed to be presented with an admissions program genuinely in controversy and a challenge to the lower court judgment before addressing the questions presented. *See Texas v. Hopwood*, 518 U.S. 1033 (1996); *id.* (Ginsburg, J., concurring). That time has now arrived.

F.Supp.2d, at 814 n.3. Whatever issues intervenors may present in the Michigan cases, they will not present the extent or degree of discrimination that is a recent part of educational history in Texas.

It is of course settled that neither the earlier denial of certiorari nor the earlier and unreviewed opinions of the court of appeals preclude review in this Court. This Court has full power to review *Hopwood III* and any part of the judgment in *Hopwood II* on which *Hopwood III* depends. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 83-86 (1995) (reviewing question decided by court of appeals on prior appeals, on which Court had previously denied certiorari); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 881 & n.1 (1990) (reviewing question decided by court of appeals on prior appeal).

Petitioners challenge the judgment of the court of appeals reaffirming the court's "judicial instruction" that the law school may not consider race in admissions decisions. If the Court decides that one or more of the State's compelling governmental interests justifies some limited consideration of race in admissions, then the law school will again consider race along with the many other factors now considered in the admissions process.[3] The court of appeals's "judicial instruction" presents the issues in the same absolute terms as the injunction in *Bakke* (and in the district

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[3]The current admissions policy considers, beyond the LSAT and GPA:

> "the rigor of the undergraduate course of study as reflected by the applicant's college transcripts, graduate study, demonstrated commitment to public service, work experience, leadership experience, extracurricular or community activities, history of overcoming economic or other disadvantage, personal experiences with discrimination, overcoming disability, disadvantaged socio-economic background, geographic diversity (particularly underrepresented regions of Texas), diversity of experience and background, maturity, ability to communicate, foreign language proficiency, honors and awards, service in the Armed Forces, publications, exceptional personal talents, and other factors." The Univ. of Tex. School of Law Application and Admissions Bulletin, p.38 (2001).

court)—whether any consideration of race, however limited and however administered, is absolutely prohibited.

The court of appeals's "judicial instruction" was in every practical respect a *de facto* injunction or declaratory judgment. Defendants, plaintiffs, and the courts below have all treated it as such. The court of appeals's "judicial instruction" is not something that must be gathered from contestable analysis of a discursive opinion. It was stated, three times, with all the precision of an injunction or declaratory judgment:

> "[T]he University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the community, or to eliminate any present effects of past discrimination by actors other than the law school." *Hopwood II*, 78 F.3d, at 962.

The instruction is repeated verbatim and reaffirmed in *Hopwood III*. 236 F.3d, at 273-74. In each repetition, the party subject to the order is named, the forbidden conduct is identified, and the prohibited justifications are listed. The judicial instruction is backed by an explicit threat of penalties. *See Hopwood II*, 78 F.3d, at 959. Judge Wiener noted that the instruction "has all of the substantive earmarks of an injunction" and that it "constitutes a de facto injunction . . . albeit without the use of the word injunction." *Id.*, at 966-67 (Wiener, J., concurring).

Defendants treated this "judicial instruction" as an injunction; they have complied for five years and will continue to do so until the instruction is vacated or superseded. Plaintiffs, too, treated the "judicial instruction" as an injunction that gave them all the prospective relief they wanted. At the first trial and on the first appeal, they sought an injunction against any use of race. *Hopwood*

II, 78 F.3d, at 955, 957-58. But once they obtained *Hopwood II*'s "judicial instruction," they opposed any attempt to implement it with a formal injunction. When the district court on remand issued the very injunction plaintiffs had originally requested, plaintiffs appealed. They argued that "[t]his Court [the court of appeals] has already set forth the limitations on defendant's conduct, 78 F.3d at 958, and accordingly the Court should vacate the injunction as it corrects the district court's other errors." *Hopwood III* Reply Brief & Brief in Opp. of Plaintiffs Hopwood & Carvell, at 43. The transparent purpose of this argument was to render more difficult any further review of the "judicial instruction."

The courts below also treated the "judicial instruction" as either an injunction or declaratory judgment—a formal judgment sufficient to support a substantial award of attorneys' fees. In *Hopwood II*, the court of appeals, in its judgment order, instructed that fees be awarded on remand. *See Hopwood III*, 236 F.3d, at 278 n.81. The district court awarded substantial fees because:

> "plaintiffs attained extraordinary success in the appellate courts. The plaintiffs accomplished the principal goal of the lawsuit—to dismantle all forms of racial preferences in public higher education in Texas." *Hopwood B*, 999 F.Supp., at 916.

The court of appeals affirmed the fee award on the same ground. *Hopwood III*, 236 F.3d, at 278.[4]

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[4]Plaintiffs were also awarded nominal damages of $1 each. *Hopwood B*, 999 F.Supp., at 923. This relief cannot support a fee award of $704,000, *see Farrar v. Hobby*, 506 U.S. 103, 114-16 (1992), and these substantial fees were not awarded on that basis. If nominal damages are the only relief, "the only reasonable fee is usually no fee at all." *Id.*, at 115.

In awarding substantial fees on this ground, the courts below necessarily treated the "judicial instruction" as a judgment, for it is settled that a mere statement of law in a judicial opinion cannot support a fee award. *See Hewitt v. Helms*, 482 U.S. 755, 759-63 (1987). Nor could this fee award be supported by the catalyst theory now before the Court in *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Resources Dep't*, No. 99-1848. In the catalyst cases, the lawsuit "produces *voluntary* action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment." *Hewitt*, 482 U.S. at 760 (emphasis added). The law school, by contrast, has complied only under the coercive threat of a "judicial instruction" that it has persistently sought to appeal for five years. If the "judicial instruction" can support a fee award, it is only because it is for all practical purposes a judgment.

Even in cases appealed under 28 U.S.C. §1292(a)(1), where an order granting, denying, or modifying an injunction is essential to jurisdiction, this Court has recognized that form is not dispositive, and that orders with all the practical consequences of an injunction will support appellate jurisdiction. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981) ("Although the District Court's order declining to enter the proposed consent decree did not in terms 'refus[e]' an 'injunctio[n],' it nevertheless had the practical effect of doing so.").

In addition, the judgment below fully satisfies the purposes of the prudential rule that "this Court reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).[5] The rule is one of substance, not of form. Its purpose is not to insulate judgments

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[5]The rule is not jurisdictional in appeals from federal courts of appeals; 28 U.S.C. §1254(1) does not require that there even be an appellate judgment to support jurisdiction in this Court.

from review in this Court, but rather to focus review on what the court below did and not on the reasons it gave. The rule means that "where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action." *J.E. Riley Inv. Co. v. Comm'r*, 311 U.S. 55, 59 (1940). In *Chevron*, the question was whether a concededly erroneous opinion had "resulted in an erroneous judgment on the validity of the regulations." 467 U.S., at 842.

Both this Court and the States have a strong interest in full appellate review of judgments striking down state laws and state programs. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the Court reviewed a judgment invalidating a municipal ordinance, even though the business challenging the ordinance had closed and its owner had retired to Florida. The Court explained that the city had an ongoing injury from the unreviewed judgment: "If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot." *Id.*, at 288. The business's attempt to preserve its judgment by mooting the case triggered the Court's "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *Id.* The Court reiterated these concerns in *City News and Novelty, Inc. v. City of Waukesha*, holding moot on similar facts a case in which the city had prevailed. 121 S.Ct. 743 (2001). The Court explained that dismissal of the writ of certiorari did not "keep Waukesha under the weight of an adverse judgment," or "reward an arguable manipulation of our jurisdiction," because it was the losing party who mooted the case by ceasing the conduct potentially in violation of municipal code. *Id.*, at 747 & n.1.

The same principles apply in this case. An important state policy has been terminated, and any implementing program prohibited, by a "judicial instruction" from the court of appeals.

The law school cannot remain forever bound by a decree that is binding for all purposes except appellate review.

If the court of appeals's "judicial instruction" is *not* reviewable in this Court, other consequences follow. The award of attorneys' fees should be summarily reversed on the merits, for if the three repetitions of the "judicial instruction" are mere statements in opinions, they cannot support a fee award. *See Hewitt*, 482 U.S., at 759-63. More fundamentally, if it was not a binding judgment, the judicial instruction itself should be vacated, because as it now stands, it has all the effect of a judgment. In cases where the lack of a formal injunction defeats appellate jurisdiction, this Court has vacated and remanded "with instructions to enter a fresh decree from which the parties may take an appeal," *Perez v. Ledesma*, 401 U.S. 82, 88 (1971), or pointedly advised the district court to "now take formal action of sufficient precision and clarity to insure to any aggrieved party the availability of an appeal." *Gunn v. Univ. Comm. To End War*, 399 U.S. 383, 390 n.6 (1970).

If on such a remand, plaintiffs continue to disclaim any desire for an injunction, then their claim to prospective relief must be dismissed. Their damages claims have all been adjudicated; they now have standing only to the extent that they "challenge[] an ongoing race-conscious program and seek[] forward-looking relief." *Texas v. Lesage*, 528 U.S. 18, 21 (1999). If plaintiffs no longer seek "forward-looking relief," their claim to such relief would be moot. When federal judgments become unreviewable because of mootness, "the established practice . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *see also United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

On the facts of this case, the rationale of *Arizonans* and *Munsingwear*—that petitioners in the Court should not be bound by a judgment that has become unreviewable through no fault of their

own—requires that each appearance of the "judicial instruction" in this case be vacated. *See Arizonans*, 520 U.S., at 71-72. 75; *Munsingwear*, 340 U.S., at 39-41. The law school is in precisely that situation until the "judicial instruction" below is either reviewed or vacated. When the Court denied certiorari in 1996, it had every reason to expect that either the judgment below had not attempted to grant prospective relief or that, if it had, the courts below would promptly embody that prospective relief in a properly appealable injunction or declaratory judgment. That reasonable expectation having been disappointed, the only possible remedies now are either to treat the "judicial instruction" as an appealable order, or to vacate its appearances in *Hopwood II* as well as in *Hopwood III*.

CONCLUSION

The petition should be granted. In the alternative, the award of attorneys' fees should be summarily reversed and the "judicial instruction" to end consideration of race in admissions should be vacated and remanded with instructions to dismiss or to enter a properly appealable judgment. If the petition is granted in *Smith v. University of Washington Law School*, No. 00-1341, then this case should be held.

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STATE OF TEXAS, *ET AL.*,
Petitioners,

v.

CHERYL J. HOPWOOD, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHERYL J. HOPWOOD,	§	
DOUGLAS W. CARVELL,	§	
KENNETH R. ELLIOTT,	§	
and DAVID A. ROGERS,	§	
Plaintiffs,	§	
vs.	§	**No. A 92 CA 563 SS**
THE STATE OF TEXAS;	§	
UNIVERSITY OF TEXAS	§	
BOARD OF REGENTS;	§	
BERNARD RAPOPORT,	§	
ELLEN C. TEMPLE,	§	
LOWELL H. LEBERMANN, JR.,	§	
ROBERT J. CRUIKSHANK,	§	
THOMAS O. HICKS, ZAN W.	§	
HOLMES, TOM LOEFFLER,	§	
MARIO E. RAMIREZ, and	§	
MARTHA E. SMILEY,	§	
as members of the Board,	§	
in their official capacities;	§	
UNIVERSITY OF TEXAS AT	§	
AUSTIN; ROBERT M. BERDAHL,	§	
President of the University of	§	
Texas at Austin in his official	§	
capacity; UNIVERSITY OF	§	
TEXAS SCHOOL OF LAW;	§	
MARK G. YUDOF, Dean of the	§	
University of Texas School of Law	§	
in his official capacity;STANLEY	§	
M. JOHANSON, Professor of Law	§	
in his official capacity,	§	
Defendants.	§	

MEMORANDUM OPINION

The plaintiffs, Cheryl J. Hopwood, a white female, and Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers, three white males, have brought suit against the defendants[1] alleging violations of the Fourteenth Amendment, 42 U.S.C.A. § 1981 (West Supp.1994), 42 U.S.C.A. § 1983 (West 1981), and Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 1981).[2] All of these provisions prohibit discrimination because of race. For the alleged violations, the plaintiffs seek injunctive and declaratory relief, as well as compensatory and punitive damages. The plaintiffs contend the defendants discriminated against them by

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[1]Defendants Bernard Rapopart, Ellen C. Temple, Lowell H. Lebermann, Jr., Robert Cruikshank, Thomas O. Hicks, Zan W. Holmes, Jr., Tom Loeffler, Mario E. Ramirez, and Martha E. Smiley are sued in their official capacities as members of the University of Texas Board of Regents. Defendant University of Texas Board of Regents is the governmental entity created by Defendant State of Texas to administer the operation of the University of Texas system, which includes Defendant University of Texas at Austin as a component institution. Defendant University of Texas School of Law is an American Bar Association accredited law school operated by the University of Texas at Austin. Defendant Robert M. Berdahl is sued in his official capacity as president of the University of Texas at Austin. Defendant Mark G. Yudof is currently Provost of the University of Texas at Austin. At all times pertinent to this lawsuit, Yudof was Dean of the University of Texas School of Law and is sued in that official capacity. Defendant Stanley M. Johanson, a Professor of Law, is sued in his official capacity as Chair of the University of Texas School of Law Admissions Committee.

[2]The plaintiffs' Title VI, § 1981, and § 1983 claims serve as vehicles to enforce underlying rights guaranteed by the Fourteenth Amendment. Therefore, the law school's admissions program must be evaluated under the equal-protection clause of the Fourteenth Amendment.

favoring less qualified black and Mexican American applicants for admission to the University of Texas School of Law through the use of a quota system. This cause was tried before the Court, without a jury, on May 16th through May 20th and May 23rd through May 25th, 1994.

The cause focuses on one of the most divisive issues faced by society, affirmative action, and highlights the tension that exists when the individual rights of nonminorities come into conflict with programs designed to aid minorities. The plaintiffs have contended that any preferential treatment to a group based on race violates the Fourteenth Amendment and, therefore, is unconstitutional. However, such a simplistic application of the Fourteenth Amendment would ignore the long history of pervasive racial discrimination in our society that the Fourteenth Amendment was adopted to remedy and the complexities of achieving the societal goal of overcoming the past effects of that discrimination. Further, the Supreme Court, which is continually faced with trying to reconcile the meaning of words written over a century ago with the realities of the latter twentieth century, has declined to succumb to an original intent or strict constructionist argument. Therefore, the Court will decline the plaintiffs' invitation to ignore the law established by the highest court of this land and to declare affirmative action based on racial preferences as unconstitutional *per se*. The issue before the Court is whether the affirmative action program employed in 1992 by the law school in its admissions procedure met the legal standard required for such programs to pass constitutional muster. The Court, having carefully considered the evidence presented at trial, the arguments of counsel, and the briefing provided by the parties, finds that it did not.

I. HISTORICAL BACKGROUND

The reasoning behind affirmative action is simple--because society has a long history of discriminating against minorities, it is not realistic to assume that the removal of barriers can suddenly

make minority individuals equal and able to avail themselves of all opportunities. Therefore, an evaluation of the purpose and necessity of affirmative action in Texas' system of higher education requires an understanding of past discrimination against blacks and Mexican Americans, the minorities receiving preferences in this cause, and the types of barriers these minorities have encountered in the educational system.

A. Discrimination in Primary and Secondary Education

The history of official discrimination in primary and secondary education in Texas is well documented in history books, case law, and the record of this trial. The Court, therefore, will address it only in summary fashion. Even after the Supreme Court's decision in *Brown v. Board of Education,* the State of Texas adopted a policy of official resistance to integration of its public schools. This policy of resistance resulted in numerous lawsuits and court-imposed desegregation plans throughout the past twenty years. *Wright,* vol. 19 at 38-44; *Romo,* vol. 17 at 45-51. Many of the school districts found to be operating dual systems of education were also found to practice official discrimination against black and Mexican American students. *Wright,* vol. 19 at 40-43; *Romo,* vol. 17 at 45-51; *Rodriguez,* vol. 17 at 8-9.

The problem of segregated schools is not a relic of the past. Despite the fact that the public school population is approximately half white and half minority, minority students in Texas attend primarily majority minority schools while white students attend primarily white schools. *Glenn,* vol. 23 at 46- 49. Further, as of May 1994, desegregation lawsuits remain pending against over forty Texas school districts. D-457; *see also* D-370, 373, 419; *Wright,* vol. 19 at 38-40; *Romo,* vol. 17 at 45-46.

The lack of educational opportunity for minorities has been compounded by the lower socioeconomic status of minorities in Texas. Statistics continue to indicate significant disparities between minority and nonminority students in skills and academic

knowledge attained in the public schools. Although the generally lower socioeconomic status of black and Mexican American families is partially accountable for some of the disparities, the gap is exacerbated by historically inferior educational preparation of minorities. *Glenn,* vol. 23 at 30-36. Further, at each educational level, there is a marked decline in the level of attainment by minorities, as reflected in comparison of drop-out rates between minorities and nonminorities and the percentages of the respective groups that graduate from high school and college.[3]

B. Discrimination in Higher Education

As with primary and secondary education, Texas' system of higher education has a history of state-sanctioned discrimination. Discrimination against blacks in the state system of higher education is well documented in history books, case law, and the State's legislative history. The State of Texas, by constitution and statute, previously required the maintenance of "separate schools . . . for the white and colored children." *See* Tex. Const. art. VII, § 7 (1925, repealed 1969). This policy resulted in the establishment of segregated schools for blacks that were inferior to the white schools. Further, opportunities available to blacks to attend college were extremely limited.[4]

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[3]In 1990, the percentage of persons age 25 or older who completed high school was 81.5% non-Hispanic white, 66.1% black, and 44.6% Hispanic. D-411. College graduate rates for the same year reflect 25.2% non-Hispanic whites, 12% black, and 7.3% Hispanic. D-412.

[4]The Texas Legislature created Prairie View State Normal & Industrial College for Colored Teachers at Prairie View (now Prairie View A & M University) for the education of "students to be taken from the colored population of this State." *Wright,* vol. 19, at 17, 19-21. Until 1947, it remained the only state-supported institution of higher learning open to black students in Texas; no type of professional training was available to blacks. *Commentary,* Tex. Const. art. VII, § 14 (West 1993). In 1947, to avoid integration of the University of Texas, the Texas

In 1946, when Heman Sweatt, a black man, sought admission to the law school and was refused admission, a Texas court, while holding that Article VII, Section 7 of the Texas Constitution precluded his admission, ordered the state to provide a law school for blacks. *See Sweatt v. Painter,* 210 S.W.2d 442 (Tex.Civ.App.—Austin 1948). The State hastily created a makeshift law school that had no permanent staff, no library staff, no facilities, and was not accredited. *Sweatt v. Painter,* 339 U.S. 629, 632, 70 S. Ct. 848, 849-50 (1950). In 1950, a unanimous United States Supreme Court ruled that the State of Texas' provisions regarding the legal education of white and minority students violated the Fourteenth Amendment and ordered that Sweatt be admitted to the previously all-white University of Texas School of Law. *Sweatt,* 339 U.S. at 636, 70 S. Ct. at 851. Sweatt left the law school in 1951 without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings. *Wright,* vol. 19 at 24-25.

The *Sweatt* case is the most flagrant incident of state-sanctioned discrimination occurring against blacks at the University of Texas. However, the record reflects that during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students. Mexican American students were segregated in on-campus housing and assigned to a dormitory known as the "barracks," as well as excluded from membership in most university-sponsored organizations. *Romo,* vol. 17 at 43. Additionally, until the mid 1960s, the Board of Regents policy prohibited blacks from living in or visiting white dormitories. *Wright,* vol. 19 at 26-28; D-482.

Beginning in the mid 1970s, discrimination in Texas' system of higher education came under attack through a court-ordered

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Legislature created the Texas State University for Negroes (now Texas Southern University). *Id.* at 21-22; D-382.

investigation by the Department of Health, Education and Welfare (HEW) Office for Civil Rights (OCR). The investigation of Texas' system resulted from a lawsuit initiated in 1970 to require HEW to take action to enforce the provisions of Title VI.[5] The court-ordered investigation of ten states, which did not include Texas, began in

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[5]*See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973), *dismissed sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

Title VI proscribes discrimination that violates the equal protection clause of the Fourteenth Amendment. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 286-87, 98 S. Ct. 2733, 2746-2747 (1978). The prohibitions against discriminatory conduct contained in Title VI govern "program[s] or activit[ies] receiving Federal financial assistance." 42 U.S.C.A. § 2000d. Thus, "Congress was legislating to assure federal funds would not be used in an improper manner." *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6, 99 S. Ct. 2721, 2729 n.6 (1979). The University of Texas, as a recipient of Title VI funds, is required to comply with Title VI.

The Department of Education, as the successor agency to HEW, is the governmental agency charged with the enforcement of Title VI and the review of programs funded through the DOE. The DOE has promulgated regulations to implement the provisions of Title VI, including regulations providing for affirmative action in certain circumstances. The regulations state that "[i]n administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of the prior discrimination." 45 C.F.R. § 80.3(b)(6)(i) (1993). The regulations state further that even if a recipient has never implemented discriminatory policies, if its services and benefits have not been equally available to some racial or nationality groups, the recipient may "establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." 45 C.F.R. § 80.5(j).

1973. In 1977, the court extended the order to an additional six states, which included Texas. *Ashworth,* vol. 12 at 8; D-296.

Between 1978 and 1980, the OCR conducted an investigation of Texas' public higher education system. The investigation culminated in a finding that Texas had "failed to eliminate vestiges of its former *de jure* racially dual system of public higher education, a system which segregated blacks and whites." D- 297. Additionally, the OCR found that Hispanics were significantly underrepresented in state institutions and indicated it would continue its investigation of discrimination against Hispanics. *Id.*

During the early 1980s, the OCR and Texas officials engaged in considerable negotiations regarding efforts to bring Texas into compliance with Title VI. Texas, in an effort to achieve a state-wide desegregation plan acceptable to the OCR, attempted to address OCR concerns through submission of the Texas Equal Education Opportunity Plan for Higher Education (Texas Plan), which included a commitment to the goal of equal educational opportunity and student body desegregation for both black and Hispanic students. D-237. In 1982, Assistant Secretary of Education Clarence Thomas informed Governor Clements that the Texas Plan was deficient because the numeric goals of black and Hispanic enrollment in graduate and professional programs were insufficient to meet Texas' commitment to enroll those minority students in proportion to the representation among graduates of the state's undergraduate institutions. *Ashworth,* vol. 12 at 16-17; D-284. Texas revised its plan and resubmitted it to the OCR; the OCR found the modified plan to be deficient because it did not set targets for increasing minority enrollment for each institution, instead of on a statewide basis, and it did not project achievement dates for the targeted goals. *Ashworth,* vol. 12 at 19-20; D-219.

In 1983, the District Court for the District of Columbia entered an order in the ongoing Title VI-enforcement suit, in which the court found that "Texas has still not committed itself to the

elements of a desegregation plan which in defendants' judgment complies with Title VI." D-446. The court ordered the DOE to begin enforcement proceedings against Texas unless Texas submitted a plan in full conformity with Title VI within forty-five days. *Ashworth,* vol. 12 at 22-23; D-446. In response to the order, the OCR submitted thirty-seven suggested measures for increasing black and Hispanic student enrollment in professional and graduate programs at traditionally white institutions. Among the suggestions were that each graduate and professional school should re-evaluate its admissions criteria and that "admissions officers will consider each candidate's entire record and will admit black and Hispanic students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." D-220.

In June 1983, the Texas Plan, as amended to account for the deficiencies identified by the OCR, was accepted by OCR as being in compliance with Title VI.[6] However, acceptance was contingent on adequate funding and completion of key activities within a specified time. D-314. Further, the Texas Plan was subject to monitoring for compliance until 1988. *Ashworth,* vol. 12 at 23, 25-26.

In November 1987, OCR contacted the state regarding the expiration of the plan in 1988 and indicated OCR would perform a

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[6]D-314. The revised plan raised the goal previously set for increased minority enrollment in graduate and professional schools. The individual goal for UT-Austin had been ten additional black students and two additional Hispanic students. *Ashworth,* vol. 12 at 26-27; vol. 13 at 56-58. The revised plan included a commitment to "seek to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs." D-238a at 5.

final evaluation to determine if further action would be necessary to bring Texas into compliance with Title VI. OCR further instructed state officials that, pending the evaluation, Texas should continue to operate under the plan. *Ashworth,* vol. 12 at 32-34; D-323.

Because Texas Higher Education Coordinating Board officials determined Texas had not met the goals and objectives of the plan, the board voluntarily developed a successor plan (Plan II) to avoid a mandate from the federal government to negotiate another plan. *Ashworth,* vol. 12 at 34-35; vol. 13 at 45-46. Plan II did not contain any specific numeric enrollment goals but retained Texas' commitment to increasing black and Hispanic student enrollment. D-326 at 9.

To date, OCR has not completed its evaluation to determine if Texas is in compliance with Title VI.[7] However, in January 1994, the DOE notified Governor Richards that OCR was continuing to oversee Texas' efforts to eliminate all vestiges of *de jure* segregation and that it would be reviewing the Texas system in light of *United States v. Fordice,* 505 U.S. 717, 112 S. Ct. 2727, 120 L. Ed. 2d 575 (1992). *Ashworth,* vol. 12 at 35-38; D-293.

Against this historical backdrop, the law school's commitment to affirmative action in the admissions process evolved.

II. THE ADMISSIONS PROCESS

A. Evolution of the Admissions Process and Affirmative Action

The law school's admissions procedure was not always a complicated process. In the early 1960s, all applicants who had taken the LSAT and had at least a 2.0 or 2.2 grade point average on

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[7] *Ashworth,* vol. 12 at 32-24. The government, as usual, proceeds with "all deliberate speed."

a 4.0 scale were accepted.[8] In about 1965, the number of applicants began to significantly exceed the law school's capacity, and, as a result, the law school established additional criteria to aid in the selection process. *Smith depo.* at 7-8.

Under the more selective system, a baseline was established each year based on the Texas Index (TI).[9] The law school automatically admitted applicants whose TI exceeded the baseline, and the admissions committee reviewed applicants whose TI was below the baseline. This procedure was used until the late 1960s when an inundation of applications meeting the baseline criterion created a class of more students than could be adequately accommodated and precluded review of those who did not qualify for automatic admission. That particular year, the first-year class of law students consisted of almost 700 students. *Johanson,* vol. 3 at 14.

As a result, the law school modified the admissions process and changed the automatic admission baseline to a presumptive admission score. Additionally, the admissions committee began to use a presumptive denial baseline, and applicants whose TI fell below that baseline were presumptively denied admission. Also

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[8] *Johanson,* vol. 3 at 12. Ernest Smith, who was a member of the admissions committee from 1965 through 1970 and dean of the law school from 1974 to 1979, testified by deposition that his recall of the required grade point average at that time was 3.0. *Smith depo.* at 7. Although neither Smith nor Johanson had exact recall of the number, their testimony is consistent in that the qualifications for admission at the time were minimal.

[9] The Texas Index is a composite number calculated by the Law School Data Assembly Service (LSDAS) that reflects an applicant's grade point average and LSAT score. The weight attributed to each component of the TI is determined by a prediction formula derived from the success of first year students in preceding years. *Johanson,* vol. 3 at 7-10.

during the late 1960s, the law school began implementing affirmative action by attempting to recruit minority individuals who had performed well in the CLEO program.[10] The only race or ethnic-based scholarships available during this time, however, were limited to "whites only." *Smith depo.* at 12.

A perception began to develop that the CLEO program had shifted its focus from students who were just below the level where law schools would seriously consider them for admission to students who were significantly below that level. *Smith depo.* at 14-16. Therefore, those responsible for admissions at the law school felt that the CLEO program could not successfully prepare the participants in one summer to be competitive students in a regular law school class. *Id.* at 16. Additionally, minorities represented only a small percentage of the entire pool of applicants to the law school, and law schools around the country competed for the top minority applicants. *Id.* at 18. In 1971, after the law school terminated its participation in the CLEO program, the law school admitted no black students. *Wright,* vol. 19 at 32.

In the early 1970s, because of the university's concern over the few minority students enrolled in the law school, a separate admissions committee, informally called the "Treece committee,"[11] was formed to consider applications from minority students and

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[10]The CLEO (Council on Legal Education Opportunity) program provided summer training at participating law schools for minority graduates of various universities. At the end of the training period, the CLEO participants were given exams. Based on their performance on those exams, some of the participants were admitted to the law school. *Smith depo.* at 9-10.

[11]The committee was named after the chair of the committee, Professor James Treece.

disadvantaged nonminority students.[12] The purpose of the committee was to ensure that the applicants the committee reviewed received "fuller consideration" than they would have in the regular admissions process. *Smith depo.* at 16. The applicants were evaluated separately from the applicants before the regular admissions committee, and the sole criterion for applicants before the Treece Committee was whether the applicant had a reasonable prospect of passing the first year.[13] The Treece committee had no set goals for the number of admissions to be made through the committee, and the number of applicants it admitted had little impact on the regular admissions.[14] In 1977, the Treece committee considered 500 applicants, including approximately 100 nonminority applicants. Of these applicants, the Treece committee admitted sixty-eight minority students and three nonminority students. "Thus, while the special subcommittee did consider and grant admission to some white applicants, the predominant objective of the special subcommittee was to increase minority enrollment at the Law School." P-1 (Smith memo to Rogers, Oct.

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[12]In the summer of 1974, just before Ernest Smith became dean of the law school, the then president of the university, Steve Spurr, expressed concern about the low minority population in the law school. Spurr indicated that a public university had an obligation to train a reasonably representative cross-section of the population in the law and that the TI, as the focus of the admissions procedure, did not adequately account for an applicant's ability to overcome past economic, cultural, and discriminatory practices. *Smith depo.* at 17.

[13]*Johanson,* vol. 3 at 15. Professor Johanson did not recall if any of the members of the Treece committee were also members of the regular admissions committee.

[14]During this time, the law school entering class was comprised of 500 students, and no more than 10% of the students could be nonresidents. *Johanson,* vol. 3 at 17.

18, 1978, at 1).

The applications before the regular admissions committee were subjected to a different process. Because of the volume of applications, the admissions committee could not give individual consideration to each application. Therefore, the law school implemented a three-category system to narrow the pool of applications requiring committee consideration. The first category of applicants, those with TIs above a certain number, were granted "administrative admission"; that is, administrative personnel automatically sent offers of admission to these applicants based on the applicants' TIs. A "presumptive denial" category was at the other end of the scale, in which administrative personnel screened the applications based on specified criteria. If the administrative person determined the file warranted further consideration, the file was sent to the regular admissions committee. The admissions committee reviewed the individual applications in the middle category or "discretionary zone," which included those referred to the committee from the presumptive denial category.

The law school used this admissions procedure until 1978 when, as a result of the Supreme Court's decision in *Bakke*, the law school reassessed its minority admissions procedure. The law school determined that, although its procedure differed from that at issue in *Bakke*, the use of the separate committees to evaluate applicants was defective.[15] Therefore, then Dean Smith directed the admissions committee to operate as one unit rather than as two subcommittees and instructed the committee to establish the administrative admission and presumptive denial lines at levels that would increase the number of applicants given individual consideration. P-1.

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[15]The law school's procedure differed from the *Bakke* procedure in that no fixed number of seats were set aside for minorities and some nonminorities were evaluated by the Treece committee. P-1 (Smith memo at 3).

After 1978, Johanson set the lines to allow for a reasonable number of minority candidates to be included with nonminorities in the discretionary zone. *Johanson,* vol. 3 at 21. The discretionary zone was then divided into five or six "bands."[16] The law school offered admission to a set percentage of applicants from each band. The percentage decreased from the first or top band to the last, a reflection of the diminishing credentials of the bands. The minority applicants were primarily clustered in the lower bands with few in the upper bands. *Wellborn,* vol. 24 at 45.

Within each band, minority and nonminority files were blended into groups of thirty. Each pile was reviewed by three committee members, each of whom was allocated a certain fixed number of votes determined by the yield desired from a particular band. Therefore, each member of the committee ultimately had total discretion to decide whether and what extent to implement affirmative action for each pile of files that person reviewed. *Wellborn,* vol. 24 at 9. Professor Wellborn testified he and other faculty members perceived two problems with this system: 1) potential unfairness to nonminority candidates who could be affected by affirmative action solely as a result of the pile in which they were included and 2) the application of personal affirmative action efforts, requiring no justification to the committee as a whole, rather than a system based on a set policy. As a result, in 1980, the law school abandoned the banding admissions procedure and formed the minority subcommittee.

The minority subcommittee was a part of the full committee that reviewed and voted on nonminority files. All minority files below the presumptive admission line were studied by the minority

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[16]Professor Johanson testified the system used five bands, while Professor Wellborn testified there were six bands.

subcommittee.[17] The subcommittee would then bring its recommendations to the full committee. At some point during the middle of the admissions process, the subcommittee would present a report to the full committee that summarized the features of the minority files being recommended for admission. The actual files were also available at the meeting so the full committee could make its own determinations about the recommended minority applicants in comparison to the nonminority applications pending at the time. At this point in the process, the members of the full committee were involved in reading piles of nonminority files and were cognizant of the qualifications of the nonminorities. Although this method often resulted in heated discussion and disagreement among committee members over whether to admit a particular candidate, the process also provided open discussion rather than the silent voting, which could have reflected personal agendas, that occurred with the banding procedure. *Wellborn,* vol. 24 at 15.

In the early 1980s, during these meetings, the committee members spent considerable time debating whether individual minority candidates met minimum admissions standards and, thus, could do passing work in law school. As a result, the full committee often examined specific minority files. The ultimate

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[17]Evidently, sometime between 1978 and 1991, the automatic or administrative admission line was changed to a presumptive admission line. The testimony is unclear as to when this occurred and, apparently, even after the change was made, those involved with the admissions procedure continued to make reference to automatic admission. *Johanson,* vol. 3 at 26, 66; *see also id.* at 29 ("I think we used the term 'automatic admit' for a long period of time, when it became part of the colloquium but did not describe the process."). Dean Sutton, who succeeded Dean Smith and was dean from 1979 to 1984, established the rule that approximately 55% of the resident class should fall within the presumptive admission category. *Johanson,* vol. 3 at 24-25. Approximately 75% of nonresident applicants are admitted from the presumptive admission category for nonresidents. *Id.*

effect was that the entire committee voted on each minority applicant that the subcommittee brought before the full committee. *Goode,* vol. 9 at 6. However, as the pool of minority candidates improved, the focus of the meetings shifted to choosing among minority candidates that the committee knew, based on their TIs, could succeed in law school. *Wellborn,* vol. 24 at 33. Therefore, less full committee review of each individual file became necessary.[18]

Ultimately, the admissions committee determined that the process was inefficient and not the most effective way of processing minority applicants. *Johanson,* vol. 5 at 27. In April 1991, "[a]fter considerable debate, the [admissions] committee, over some strong opposition, directed the chair [Johanson] to form a subcommittee (including Deans Aleman and Hamilton and the two minority students) which was to review the minority files and recommend sufficient candidates for admission to achieve a class that was 5% Black and 10% MA."[19] Therefore, by 1992, the full admissions committee no longer selected individual applicants for admission. *Wellborn,* vol. 24 at 53. Instead, the minority subcommittee compiled a list and presented it to the full committee, which made

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[18]Because the law school was receiving better qualified minority applicants, the focus of the process changed from whether to accept a particular minority applicant to a more selective process between the individual minority applicants. *Wellborn,* vol. 24 at 33. Had the admissions committee continued to apply its previous standards, the number of minorities in the entering class would have continued to grow. However, the committee elected instead to "take advantage of this opportunity to have more excellent minority students than we had before, who would be more competitive with the non-minority students, but perhaps in more limited numbers that would still constitute reasonable representation." *Id.* at 35.

[19]P-25. The percentage goals are based on the percentages of minority college graduates. *See supra* note 6.

a judgment of how many offers to give to minority applicants. The minority subcommittee was then delegated the task of deciding which individual minority applicants were to receive offers of admission. Thus, by 1992, the admissions process, although involving some interaction and exchange of information between the full committee and minority subcommittee, was markedly similar to the pre-*Bakke* procedure of two separate committees. This 1992 procedure is the crux of this lawsuit.

B. 1992 Admissions Process

In 1992, the admissions committee was comprised of nine professors, two assistant deans, and four students. *Johanson,* vol. 6 at 26. The minority subcommittee was comprised of Johanson, Aleman, and Hamilton, all of whom were also members of the full committee.[20] Aleman, however, did not participate in reviewing nonminority applications. *Johanson,* vol. 6 at 25-26.

In 1992 when an application arrived, administrative personnel placed it in an individual folder, to which additional materials, such as letters of recommendation, were added as they arrived at the law school. Each folder was color-coded based on two criteria: residency and race or ethnicity. The residency classification indicated whether the applicant was a resident or nonresident of Texas. The race or ethnicity classification was based on which of several boxes the applicant checked on the application: Black/African American, Native American, Asian American, Mexican American, Other Hispanic, White, or Other. *Hamilton,* vol. 2 at 19-20.

The application deadline was February 1. However, because the law school wished to get early offers sent to top applicants in late

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[20]Professor Johanson, who is white, has been on the admissions committee since 1964 and chair of the committee since 1973. Dean Aleman is an assistant dean and is Mexican American. Dean Hamilton was an assistant dean from 1990 through 1993 and is black.

January if possible, Johanson drew initial presumptive admission lines as soon as he had an initial computer printout showing the numbers and qualifications of the applicants. *Johanson,* vol. 3 at 26-27. At this point, about half of the applications were complete; therefore, Johanson drew the initial lines relatively high to avoid too many early offers of admission before the quality of the entire pool of applicants was defined.[21] The goal of the initial presumptive admission lines Johanson drew was to ensure that the top candidates in each category received offers of admission from the law school as soon as possible.[22]

Once Johanson determined which files were in the presumptive admission category, he conducted a preliminary review of the

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[21]At some point in the process, the presumptive admission line for nonminority resident admissions was adjusted downward to ensure that approximately 55% of the resident admissions would be presumptively admitted. The 55/45 split did not apply to nonresident applicants, approximately 75% of whom were admitted presumptively on the basis of their TI. *See supra* note 17.

[22]*Johanson*, vol. 3 at 26. In 1992, the law school received approximately 2100 resident applications and 2300 nonresident applications. *Johanson,* vol. 3 at 35. The pool of nonresident applicants was very strong, many with credentials well above those of the presumptively admitted residents. *Id.* at 36. Accordingly, the presumptive admission and denial scores were set at a higher level for nonresident applicants. However, as with resident applicants, lower scores were set for Mexican American and black nonresident applicants than for nonminority nonresident applicants.

Johanson testified the enrollment yield for nonresidents is approximately 26%, meaning that the law school has to offer approximately four nonresidents admission to enroll one. *Id.* at 37. The enrollment yield for residents is 66 to 68%, that is, for every 100 offers of admission, 66 to 68 resident applicants accept.

files.[23] By the end of the admissions process, Johanson reviewed 300 to 350 resident files and 200 to 250 nonresident files in this category. *Johanson,* vol. 3 at 32-35. In his review of these files, Johanson checked to see if the applicant's TI was inflated by high grades in a noncompetitive major or at a weak school or if there was some other questionable feature of the applicant's file. Johanson generally held those files for further review in the discretionary zone. Johanson dropped approximately ten percent of the presumptive admission applicants into the discretionary category. Those applicants with a high TI reflecting a high LSAT and high grades in a rigorous major at a leading undergraduate institution were admitted by Johanson, who had unilateral authority to admit any applicant in this category without further consultation with the full admissions committee. D-362.

At the other end of the spectrum, Johanson set another line, and applicants whose TIs fell below that line were presumptively denied admission. One or two members of the admissions committee reviewed each application in this category to determine if the TI adequately reflected the applicant's likelihood of success in law school or competitive standing relative to the entire applicant pool. *Johanson,* vol. 3 at 31-32; P-41; D-362. Generally, as a result of this review, twenty to forty files were upgraded from the presumptive denial zone to the discretionary zone, although Johanson did not recall the specific number of files moved to the discretionary zone in 1992. *Johanson,* vol. 5 at 24-25.

The middle category was comprised of those applicants whose TIs fell between the presumptive denial line and the presumptive admission line, those applicants who Johanson had moved down from the presumptive admission category, and those applicants who reviewers had moved up from the presumptive denial category. In the middle discretionary category, reviewers focused less attention

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[23]Johanson reviewed minority and nonminority files together as a group during the preliminary review process. *Johanson,* vol. 6 at 55.

on the applicant's numbers, as all were relatively close, and instead carefully evaluated the applicant's qualifications as reflected by the entire file. *Goode*, vol. 9 at 4; D-362.

The standards the law school applied to assess applicants in this system differed based on race and national origin in two ways. First, Johanson's determination of the presumptive admission and denial TIs varied between nonminorities and minorities.[24] By March 1992, Johanson had lowered the presumptive admission score for resident nonminorities from a threshold setting of 202/90 to 199/87.[25] Similarly, Johanson lowered the presumptive admission score for Mexican American applicants from 196/84 to 189/78 and the presumptive admission score for black applicants from 192/80 to 189/78. P-49. The presumptive denial score for nonminorities was 192/80, and the presumptive denial score for blacks and Mexican Americans was 179/69. Thus, the presumptive denial score for nonminorities was higher than the presumptive admission score for minorities.

Additionally, the law school admissions committee had different procedures for the review of nonminority and minority files in the discretionary zone. Nonminority files were divided into stacks of thirty, which were reviewed by three members of the

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[24]Johanson's setting of these scores was a process that evolved over the course of the admissions process based on the pool of applicants, the number of offers, and the number of acceptances. Initially, the numbers were set high and lowered as the yield from offers and composition of the entering class began to develop. *Johanson*, vol. 5, at 10-11; P-38–P-44.

[25]P-38. In 1992, the law school was faced with two different types of TIs, one based on a two digit LSAT score and one based on a three digit LSAT score. This was a result of the change in the scaling of the LSAT from a 10-to-48 scale to a 120-to-180 scale. Johanson therefore had to set presumptive lines coordinated to two separate TI formulas to accommodate the two types of TIs received for applicants. *Johanson*, vol. 3 at 26-27.

admissions committee.[26] Each person on the three- person subcommittee voted, on an individual basis with no verbal or written explanation, to offer admission to a set number of applicants from within the stack of thirty files.[27] After the three members completed their independent screening of the files, Johanson compiled a master tally sheet reflecting the number of votes received by each applicant in the group of thirty-five. *See, e.g.*, P-73. Subject to Johanson's review, those applicants that received two or three votes were offered admission.[28] In 1992, the law school made an average of nine offers of admission per stack. P-58. Those who received no votes were automatically denied admission at that time.[29] The law school sent a letter offering applicants who

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[26]In 1992, the admissions committee reviewed 18 stacks in the nonminority discretionary zone—17 stacks of 30 files and one stack of 16 files. P-58, P-59. This process began in early March and was virtually complete by mid to late April. *Johanson (by depo.)*, vol. 25 at 7.

[27]In 1992, Johanson allotted each person on the subcommittees nine votes per stack. D-332 at A-29. Committee members were required to screen five stacks. P-55. Therefore, although each member of the admissions committee reviewed more than one stack of files, no individual reviewed all the files in the discretionary zone.

[28]Johanson testified that he had "rarely, if ever" vetoed a committee recommendation based on two or three votes, except in instances where an administrative problem might make an individual ineligible for law school.

[29]Johanson, in rebuttal testimony provided by deposition, testified, "[T]hose candidates who receive zero votes to admit, they're done. *I don't even look at their files.* Three people have said in comparison to our applicant pool they are not worthy of being admitted. They will—the next day they will get their denial . . . ." *Johanson (by depo.)*, vol. 25 at 10 (emphasis added). This testimony contradicts the statement in the law school's "Statement of Policy on Affirmative Action," which states that

received one vote a place on the waiting list.

The minority subcommittee reviewed the minority files. In theory, each member of the subcommittee was to be part of the three-person subcommittees that reviewed the nonminority files. The testimony reflected, however, that in 1992 Aleman was not on any of the nonminority screening subcommittees. *Compare* D-362 *with Johanson,* vol. 6 at 26. According to the testimony, instead of each member of the minority subcommittee performing an individual review of the minority files, as was the procedure for review of nonminority files, the minority subcommittee met as a group and reviewed each minority applicant's file.[30] The subcommittee did not review a set number of files at each meeting but, instead, made as many decisions as the members felt comfortable with until their "decision-making powers started to wane." *Johanson,* vol. 5 at 30. Resident presumptive denial minority files were screened exclusively by Johanson and Hamilton. *Id.* at 25.

The members of the minority subcommittee attended the meeting of the full committee and provided the full committee with a summary of the files the subcommittee believed to be good applicants for admission. *Wellborn,* vol. 24 at 18. Although the evidence reflected that the subcommittee shared general information about the minority pool of applicants with the full committee, the minority subcommittee's admission decisions on

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all final decisions on each applicant file are made by Johanson. *See* D-362 at 4.

[30]Both Johanson and Hamilton attended all the meetings; Aleman's attendance was not regular. Frequently, student members of the subcommittee attended the meetings, although they were not voting members of the subcommittee. *Johanson,* vol. 5 at 28-29.

individual applicants were virtually final.[31]

C. Admission Goals and Guidelines

The law school is the State's premier law school and is top-rated nationally. The cost of a legal education at the law school, a state-supported institution, is inexpensive in comparison to other schools of its caliber and, therefore, a bargain for the quality of education the law school's students receive. As a consequence, over 4000 applicants to law school each year compete for approximately 500 available seats.[32]

In selecting the entering class, the law school admissions committee has two specified requirements it must achieve. First, state law mandates the percentage of nonresidents that may be included in the entering class. In 1992, the law school was prohibited from having more than fifteen percent nonresidents in the entering class.[33] The other fixed figure to which the admissions committee must adhere has been set by the Board of Regents. This mandate requires the entering class to be composed of at least 500

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[31] Johanson testified that, although a "particularly naughty problem" might be brought before the entire committee, almost all final decisions were made by the subcommittee. *Johanson*, vol. 5 at 29; *see also Johanson*, vol. 6 at 47.

[32] The law school received 4,494 applications for the fall 1992 incoming class. It offered admission to 936 applicants to fill a class of slightly over 500 students. D-447 (Aff. of Rita Bohr at A-4). The overall median GPA for entering students was 3.52, and the overall median LSAT was 162 (89th percentile). D-433. The median figures for nonminorities were a GPA of 3.56 and an LSAT of 164 (93rd percentile); for blacks, a GPA of 3.30 and an LSAT of 158 (78th percentile); and for Mexican Americans, a GPA of 3.24 and an LSAT of 157 (75%). *Id.*

[33] *Johanson*, vol. 4 at 9, 31. The percentage of nonresidents that may comprise an entering class has recently been increased to 20%. *Johanson*, vol. 4 at 46.

students.

In addition to these established figures, the law school attempts to meet the targets established by the Office of Civil Rights through the Texas Plan of ten percent Mexican American students and five percent black students in an entering class. *Johanson,* vol. 4 at 10. These numbers reflect an effort to achieve an entering class with levels of minority enrollment generally consistent with the percentages of black and Mexican American college graduates. The OCR figures, however, are aspirations only, subject to the quality of the pool of applicants. *Johanson,* vol. 4 at 9; *Goode,* vol. 9 at 12-13.

Personal interviews are not part of the law school's admission process.[34] Therefore, the law school must make its decision based on the information provided in the applicant's file, which, in addition to the application form and LSDAS material, may include a personal statement or letters of recommendation. The law school used the TI as an administrative tool to order candidates for review in the admissions process. However, the law school did not rely solely on the TI as the basis for admissions decisions but instead used it to create presumptions that could be overcome upon individual review of the files.[35] The importance of individual review stems from the fact that the applicants selected for admission come from a relatively narrow band within the full range

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[34]Nevertheless, Hamilton, as assistant dean of admissions responsible for recruiting the law school class, actively recruited minority students through "one-on-one" discussions and scholarship enticements. *Hamilton,* vol. 2 at 4-5, 9, 12-13.

[35]The practice of using the GPA/LSAT index as a sorting mechanism is used by many nationally prominent law schools. *Brest,* vol. 22 at 13-14; *Stein,* Vol. 18 at 15; *Bollinger,* vol. 16 at 11-14; *Wegner depo.* at 9-10. However, none rely on the index as the sole basis for admission decisions. *Id.*; *see also* D-448.

of scores, and a difference of few points does not necessarily correlate with more successful work in law school. *Johanson,* vol. 3 at 11; *Stein,* vol. 18 at 15. Further, the TI does not adequately reflect the qualifications and characteristics a law school should consider in developing a diverse student body, which provides substantial educational benefit for all members of a law school class. *Brest,* vol. 22 at 14.

III. THE PLAINTIFFS

In 1992, Hopwood, Elliott, Carvell, and Rogers applied for admission to the law school. Hopwood is a white female; Elliott, Carvell, and Rogers are white males. None of the plaintiffs are Mexican American and all are residents of Texas.[36]

A. Cheryl Hopwood

Cheryl Hopwood had a TI of 199, which placed her in the resident presumptive admit range. Hopwood's TI reflects a 3.8 grade point average and an LSAT score of 39.[37] Hopwood's application indicates she received an associate's degree in accounting from Montgomery County Community College in May

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[36]The defendants contend that Hopwood should have been evaluated as a nonresident and, accordingly, would not have been in the presumptive admit range for nonresidents. However, Johanson testified that Hopwood did not misrepresent her status to the law school. She stated in her application she was married to a person in the military who was stationed in Texas at the time of her application. The law school treated her application as that of a resident throughout the process. *Johanson,* vol. 5 at 14. Further, Hopwood's residency classification was consistent with the law school's policies in effect at the time. *Id.; Johanson,* vol. 4 at 44-45; *Hopwood,* vol. 8 at 12-13.

[37]Hopwood's LSAT score placed her in the 83rd percentile, well below the median LSAT for nonminorities in the 1992 entering class. P-145; D-433. Her two-digit TI was an 87, which correlates to 199 in the three-digit scoring system.

1984 and a bachelor's degree in accounting from California State University in Sacramento in 1988. The application further indicates she is a certified public accountant in California, she worked twenty to thirty hours a week while obtaining her undergraduate degree, and she was active in Big Brothers and Big Sisters in California. P-145. Hopwood submitted an additional letter to the law school dated January 22, 1992, requesting permission to attend law school on a limited basis the first year, if accepted, because of the needs of her child, who had been born with cerebral palsy.[38] Hopwood's application file contains no letters of recommendation.[39] Additionally, her responses to the questions are brief and do not elaborate on her background and skill. She provided no personal statement with the application.[40]

After his initial review of Hopwood's file, Johanson dropped her

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[38]Hopwood testified that although her child was initially diagnosed with cerebral palsy, she has been found to have an extremely rare muscle disease and is severely handicapped. *Hopwood,* vol. 8 at 8-9. This information is not included in her admission file.

[39]Hopwood testified that although she had been prepared to submit letters of recommendation, a person in the admissions office informed her that, because of the large number of applications, the school did not have time to look at recommendations. *Hopwood,* vol. 8 at 6.

[40]Hopwood testified that while in high school, she applied for college at Temple, Princeton, and Penn State and was offered admission at each school. However, because she had to pay for her own education and had to work her way through school, she could not afford to go to these schools. *Hopwood,* vol. 8 at 4. However, this information is not included in Hopwood's application despite the following statement on the application: "Please make any other comments about your college transcripts or your preparation for college (such as disadvantaged educational or economic background) that you believe will help the Admissions Committee in evaluating your application."

from the presumptive admission zone to the discretionary zone because, in his evaluation, she had not attended schools that were academically competitive with those of the majority of the applicants, had a large number of hours at junior colleges, and was able to maintain a high GPA although working a substantial number of hours.[41] Her file was subsequently reviewed by a three-member subcommittee of the admissions committee, which was comprised of Associate Dean Michael Sharlot, Dean Hamilton, and a law student. P-217 (Answer to int. 3). Because Hopwood received only one vote as result of the subcommittee review, the law school sent her a letter, dated April 8, 1992, offering her a place on the waiting list.[42]

The letter, which stated "[w]e regret that we cannot grant you admission to the 1992 entering class of the Law School at this time," instructed Hopwood to return the attached form to the law school within three weeks if she wished to be placed on the waiting list. P-145. The letter further instructed Hopwood not to put her name on the list if she would not be able to accept an offer of admission as late as August. Hopwood testified she subsequently called the law school admissions office and was told offers could be made from the waiting list through the first week of school. *Hopwood*, vol. 8 at 11-12. Hopwood did not put her name on the

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[41]*Johanson*, vol. 5 at 14-17. Johanson believed that Hopwood's ability to work a significant number of hours while maintaining a high GPA was indicative of earning her GPA while on "a fairly slow track" at a non- competitive institution. *Id.* at 15-16. In contrast, Associate Dean Sharlot found that Hopwood's achievement of a high GPA while working was a "definite plus." D-334. This "plus," however, was insufficient to overcome Hopwood's below-median performance on the LSAT and attendance at a series of "very weak schools." *Id.*

[42]Hopwood received one vote from Hamilton, who was also a member of the minority subcommittee. P-217 (Answer to int. 4); D-333 at A-37.

list because personnel in the law school's admissions office could provide no information regarding the likelihood of admittance from the list and Hopwood did not believe she would be in a position to make last minute arrangements for her special childcare needs if she were admitted either just before or in the first week of classes. *Hopwood,* vol. 8 at 12.

The Court finds that, under Hopwood's circumstances, she was effectively denied admission when she received the April 8 letter. Her failure to accept a position on the waiting list or to seek a deferral of admission until the following year, which information the Court notes is not included in the law school's April 8 letter to Hopwood, does not negate this fact.[43]

B. Kenneth Elliott

Kenneth Elliott applied with a TI of 197, representing a GPA of 2.98 and an LSAT score of 167. Elliott's application indicates he received a B.B.A. in accounting from the University of Texas in 1984, is a certified public accountant, and has worked as an auditor or examiner for state agencies since receiving his undergraduate degree. P-153. In addition to his personal statement, Elliott's file contains two letters of recommendation from employment supervisors.

In the discretionary zone of nonminority applicants, Elliott's file

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[43]The Court notes that during 1992, individuals were offered admission from the waiting list. Of the 332 applicants offered a position on the waiting list in 1992, 75 were admitted. D-447 (Aff. of Rita Bohr at A-5). Hamilton testified that as late as the first week of classes, seven persons were admitted from the waiting list. Hamilton, vol. 2 at 65-67. However, the Court also notes from the affidavits of Johanson and Hamilton that Hopwood had little likelihood of acceptance from a waiting list. In fact, Hamilton specifically stated, "It is my belief that Ms. Hopwood [would] not have been admitted off the waiting list at a later time." D-333 at A-39.

was reviewed by a subcommittee of three that included Johanson. D-332 at A-33. Elliott received no votes, and the law school sent him a denial letter dated April 11, 1992. P-153. In July 1992, Elliott's father wrote a letter to Dean Mark Yudof in which he requested that Elliott's application for admission be reconsidered. P-165. Elliott's father further stated that Elliott did not know he was writing the letter and that Elliott's "friends and family all feel that he was not accepted to U.T. because of limited openings at U.T. due to mandatory minority and women quotas which use a large percentage of the openings."[44] The dean referred the letter to Hamilton, who informed Elliott's father that although she was not at liberty to discuss Elliott's application, she would pursue the matter with Elliott if Elliott felt he had been treated unfairly. *Hamilton,* vol. 2 at 67. Hamilton testified she telephoned Elliott, told him she had received a letter on his behalf, and invited him to come to her office to visit. *Id.* at 67-68. Hamilton testified Elliott canceled the first appointment and she scheduled a second appointment, which she canceled. Hamilton testified she subsequently called him back and told him she was placing him on the waiting list.[45] Elliott, however, testified he had no further conversations with anyone at the law school after the failed meetings and did not know he had been placed on the waiting list. *Elliott,* vol. 7 at 21.

Hamilton testified that on August 24, she decided to grant Elliott an offer of admission, left a message on his answering

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[44]P-165. The only copy of the letter in the record is an unsigned draft provided by the plaintiffs. Hamilton testified that the letter actually received by the law school had been administratively misplaced since the summer of 1992. *Hamilton,* vol. 2 at 68-69.

[45]*Id.* Johanson testified it was "quite unusual" for someone to be reconsidered and placed on the waiting list without Johanson's awareness of the decision. *Johanson,* vol. 5 at 19-21. He testified he knew nothing about Elliott being placed on the waiting list. *Id.*

machine, and instructed admissions personnel to continue to try to reach him. *Hamilton,* vol. 2 at 58-59. Hamilton stated that approximately a week later, after classes had begun, Elliott returned her call but indicated it was impossible for him to attend school at that time. *Id.* at 59-60. However, in Hamilton's affidavit, submitted to this Court as part of the pretrial motions, Hamilton stated that Elliott never responded to her phone calls. D-447 (Supp.Decl. of Hamilton at 3). Further, Elliott's file contains no letters either notifying him of his placement on the waiting list or his admission to school, despite the existence of such documentation for others offered admission from the waiting list late in the process.

The Court finds that Elliott had to have realized, at minimum, his application was under reconsideration when an assistant dean initially contacted him. However, being offered a position on the waiting list, as the Court has already found, is not equivalent to admission. To determine whether Elliott actually received an offer of admission, the Court must evaluate the conflicting testimony of Elliott and Hamilton. The discrepancies in Hamilton's affidavit and trial testimony, as well as the law school's lack of documentation of Elliott's status, weigh in Elliott's favor.[46] Accordingly, the Court finds that Elliott was not notified of his admission to law school.

In 1992, Elliott also applied to Baylor School of Law and Texas Tech School of Law. He was denied admission to Baylor. Although accepted at Texas Tech, a state university, Elliott declined the offer of admission by letter dated June 2, 1992. *See* D-401.

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[46]The Court is not implying that Hamilton testified in an untruthful manner. However, because of the number of applicant files Hamilton was required to address and the time pressures under which she was working as the beginning of the school year approached, the Court believes it very possible her recall of the chronology of specific events may be inaccurate.

C. Douglas Carvell

Douglas Carvell had a TI of 197, which was based on an undergraduate GPA of 3.28 and an average LSAT score in the 76th percentile.[47] His application reflects that in 1991 he received his B.A. in political science from Hendrix College in Conway, Arizona. P-151. The LSDAS report indicates Carvell ranked 98th in his class of 247 at Hendrix College. P-151; D-336 at A-49. Carvell provided detailed responses to the application questions on typewritten attachments to his application. Carvell's file included three letters of recommendation, one from a professor at Hendrix College that compliments his intellectual abilities but describes his performance as uneven, disappointing, and mediocre. P-151.

Because Carvell's TI placed him in the nonminority discretionary zone, his file was reviewed by a subcommittee of three. He received no votes from the two faculty members on the subcommittee, Professors Steven Goode and Mark Gergen, but did get one favorable vote from a student member of the committee. *See* D-335, D-336. Therefore, by letter dated April 15, 1992, the law school offered him a position on the waiting list, which he accepted. While he was on the waiting list, Carvell's file was reviewed by Associate Dean Michael Sharlot, a member of the admissions committee. Sharlot did not vote to admit Carvell from the waiting list. D-334 at A-43-A-44. By letter dated July 16, 1992, the law school denied Carvell admission. P-151.

In addition to the law school, Carvell applied for admission to Southern Methodist University School of Law and Vanderbilt School of Law. He was denied admission to Vanderbilt, but was accepted at SMU, where he has completed his first year of law

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[47]Carvell's application reflects that he took the LSAT twice, receiving a score of 34 (61st percentile) the first time and a score of 164 (91st percentile) the second time. The LSAT factored in his TI is an average of these two scores.

school. *Carvell,* vol. 10 at 6-7. Carvell also applied to the University of Texas School of Business and was denied admission. *Id.* at 12. At SMU, Carvell is pursuing a master's of business administration in a joint program with the SMU law school. *Id.* at 6.

D. David Rogers

David Rogers had a TI of 197 based on his undergraduate GPA of 3.13 and an LSAT score of 166. In the early to mid-1980s, Rogers attended the University of Texas as a student in Plan II, an honors program. However, in 1985, he was dismissed because of his poor scholastic performance. *Rogers,* vol. 11 at 55. Rogers subsequently attended the University of Houston-Downtown and received an undergraduate degree in professional writing in 1990. P-171; *Rogers,* vol. 11 at 56. In 1992, Rogers received an advanced degree in professional writing from the University of Southern California. P-171. Rogers noted on his law school application that "as a white who attended an all-minority school for several years, and who was raised by a single mother, I have an unusual understanding of the challenges faced by women and minorities." P-171. Rogers's application file contains no letters of recommendation. P-171; *see also* D-335 at A-46-A-47.

Rogers received no votes from any member of the subcommittee that reviewed his file in the nonminority discretionary zone. By letter dated April 7, 1992, he was denied admission to the law school. P-171.

IV. DISCUSSION

A. Ripeness and Standing

As a preliminary matter, the defendants contest the ripeness of two of the plaintiffs' claims and the standing of all plaintiffs to

bring this cause of action.[48] With regard to Hopwood and Elliott, the defendants argue their claims are not ripe because neither was denied admission.[49] As stated above, the Court has found both Hopwood and Elliott were, in effect, denied admission to the law school. Therefore, a ripe controversy exists between these two plaintiffs and the defendants.

The defendants contend Hopwood lacked standing to challenge the admissions policy because she failed to accept a position on the waiting list or to ask for deferred admission. Therefore, according to the defendants, she has failed to exhaust the administrative procedures available to her. The defendants further contend all plaintiffs lack standing in that none can show they would have been granted admission absent the challenged admissions policies.[50]

To have standing to challenge a governmental action, a plaintiff must demonstrate a concrete "injury in fact," a causal relationship between the injury and the challenged conduct, and a likelihood the injury will be redressed by a favorable decision. *Northeastern Fla. Contractors v. City of Jacksonville*, ___ U.S. ___, 113 S. Ct. 2297, 2301-02 (1993). However, the "injury in fact" in an equal protection case involving a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group is the denial of the equal treatment and not the ultimate inability to obtain the benefit. *Id.* at ___, 113 S. Ct. at 2303.

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[48]This matter was addressed at length in pretrial motions and hearings, and the transcripts and evidence related to those motions are evidence in this cause.

[49]As discussed above, the defendants claim Hopwood voluntarily removed herself from the admissions process and Elliott was offered admission.

[50]With regard to Elliott, the defendants contend he lacks standing to challenge the initial decision to deny him admission.

The defendants assert this exception to requiring plaintiffs to show a direct causal relationship is limited in its application to challenges to the validity of express set-asides or reservations such as those addressed in *City of Jacksonville* and *Bakke*. The Court does not read the requirements for standing set forth in *City of Jacksonville* to be limited in the manner defendants contend. In defining standing as applied in equal protection cases, the Supreme Court reviewed its precedent on the issue. The overarching proposition of the cases the Supreme Court cited in reaching its holding was not that the causal-connection exception applied only to specific set-asides, but that an "injury in fact" stemmed from any governmental barrier that either created a discriminatory obstacle or had the effect of producing unequal access to a governmental benefit.[51] Accordingly, the Court finds all the plaintiffs have standing--they have sufficiently alleged that the law school's admission process is the cause of their injury and that a judicial order could redress the injury.[52]

B. Standard of Review

Affirmative action plans based on race trigger strict judicial scrutiny. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 721 (1989); *see also Bakke*, 438 U.S. at 291, 98 S. Ct. at 2748 (Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."). Further, "the level of scrutiny does not change merely because the challenged classification operates against a

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[51]*See id.* at 2302-03 (discussing *Clements v. Fashing*, 457 U.S. 957, 102 S. Ct. 2836 (1982); *Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978); and *Turner v. Fouche*, 396 U.S. 346, 90 S. Ct. 532 (1970)).

[52]Further, the law school's 1992 procedure for review of applicants in the discretionary zone effectively prevents any nonminority candidate from establishing that he or she would have been admitted but for the preference given to minority applicants. *See infra* note 86.

group that historically has not been subject to governmental discrimination." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273, 106 S. Ct. 1842, 1846 (1986); *see also Croson*, 488 U.S. at 494, 109 S. Ct. at 722 (reaffirming equal protection analysis is not dependent on the race of those burdened or benefited by a classification).

The defendants contend, however, strict scrutiny is inappropriate in this cause in light of the Supreme Court's holding in *Metro Broadcasting v. FCC*, ___ U.S. ___, 110 S. Ct. 2997 (1990). In *Metro Broadcasting*, the Supreme Court held that affirmative action plans adopted pursuant to federal mandates are subject to intermediate scrutiny–a determination whether the plans serve important governmental objectives and whether they are substantially related to the achievement of the objectives. *Id.* at ___, 110 S. Ct. at 3009. The defendants contend that the Texas Plans equate to a federal mandate because they stem from the OCR's insistence on full compliance with Title VI, an objective that is within the power of Congress.[53]

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[53]The defendants also contend a suit against the State of Texas or the University of Texas is an impermissible collateral attack on OCR programs and regulations and, in support of this proposition, cite *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954, 111 S. Ct. 2261 (1991). However, in this cause the plaintiffs are not attempting to challenge a federal statute creating minority business set-asides by challenging the State's role in the program. Instead, the plaintiffs in this cause are challenging the specific procedure the law school voluntarily designed and implemented to achieve affirmative action goals suggested by OCR. The constitutionality of the law school's procedure is not dependent on whether the OCR can require affirmative remedies for a Title VI violation. *See Podberesky v. Kirwan*, 764 F. Supp. 364, 374 (D. Md. 1991), *rev'd and remanded*, 956 F.2d 52 (4th Cir. 1992), *on remand*, 838 F. Supp. 1075 (D. Md. 1993).

The Court finds the argument unpersuasive. In *Metro,* the FCC's minority ownership programs had been specifically mandated and approved by Congress. *Id.* at 563, 110 S. Ct. at 3008. While it is true that Congress has the power to identify and redress the effects of discrimination and has charged the DOE with assuring compliance with Title VI, there is no similar congressional mandate in this cause. Further, the FCC is a licensing body that, pursuant to a congressional mandate, established specific minority ownership policies. The OCR has provided Texas with a number of suggested tools Texas may implement to bring the higher educational system into compliance with Title VI; it has not, however, required the State to adopt any specific procedures. Although the defendants characterize the law school's efforts as pursuant to an OCR "consent decree," the evidence reflects that, to date, the State of Texas' efforts to comply with Title VI have been made voluntarily in an effort to avoid a specific mandate or the loss of federal funding. *Ashworth,* vol. 13 at 34, 39.

Further, under equal protection analysis, the same level of scrutiny applies to race-conscious affirmative action plans adopted pursuant to consent agreements as to other voluntarily adopted plans. *See, e.g., In re Birmingham Reverse Discrimination Employment Litig.,* 833 F.2d 1492, 1501 (11th Cir.1987), *aff'd sub nom. Martin v. Wilks,* 490 U.S. 755, 109 S. Ct. 2180 (1989) (Title VII consent decree). Indeed, the most recent circuit court opinion analyzing an affirmative action plan in the education context, specifically a scholarship plan adopted in response to protracted litigation and OCR guidelines, upheld the lower court's application of strict scrutiny as the proper standard for review of the plan. *See Podberesky v. Kirwan,* 956 F.2d 52, 55 (4th Cir.1992).

The most compelling justification for application of strict scrutiny in this context is to provide assurance that individual rights are afforded the full protection they merit under the Constitution. Only by applying strict scrutiny can a court honestly weigh the validity and necessity of efforts to remedy past wrongs against the

rights of otherwise qualified nonminorities affected by the efforts. Although the use of racial classifications is disfavored, there are instances when such classifications serving proper purposes should be upheld. Only through diligent judicial examination can a court determine if a classification is consistent with constitutional guarantees and not related to "illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493, 109 S. Ct. at 721. Accordingly, the Court concludes the law school admissions process must be subjected to a strict scrutiny test under the Equal Protection Clause of the Fourteenth Amendment to protect both the integrity of the process and the important individual rights at issue.[54]

B. Application of Strict Scrutiny

Strict judicial scrutiny involves a determination of whether the law school process served "a compelling governmental interest" and whether the process is "narrowly tailored to the achievement of that goal." *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 106 S. Ct. 1842, 1847 (1986). The purpose of ascertaining whether a compelling governmental interest exists is to "smoke out" illegitimate uses of race by ensuring that the goal is important enough to use the suspect tool of racial preference. *Croson*, 488

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[54] As an additional point, even if the Court were to find intermediate scrutiny to be the proper standard of review, the Court would still be required to assess whether the process imposed undue burdens on nonminorities. *See Metro Broadcasting*, __ U.S. at __, 110 S. Ct. at 3026 ("[A] congressionally mandated benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose *undue* burdens on nonminorities."). As discussed *infra* pp. 58-67, the burden imposed upon nonminorities by the law school's admissions procedure is a very troubling aspect of the process and, ultimately, in this Court's view, renders the process constitutionally impermissible.

U.S. at 493, 109 S. Ct. at 721. The narrowly tailored analysis "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*

1. Compelling Governmental Interest.—Both sides expended considerable time and effort at trial on the issue of whether a compelling governmental interest existed sufficient to justify the need for the law school's affirmative action program. The defendants offered a number of reasons as justification for the law school's affirmative action program. These reasons are set forth in the law school's "Statement of Policy on Affirmative Action":[55]

> To achieve the School of Law's mission of providing a first class legal education to future leaders of the bench and bar of the state by offering real opportunities for admission to members of the two largest minority groups in Texas, Mexican Americans and African Americans;
>
> To achieve the diversity of background and experience in its student population essential to prepare students for the real world functioning of the law in our diverse nation;
>
> To assist in redressing the decades of educational discrimination to which African Americans and Mexican Americans have been subjected in the public school systems of the State of Texas;
>
> To achieve compliance with the 1983 consent decree entered with the Office of Civil Rights of the Department of Education imposing specific requirement for increased efforts to recruit African American and Mexican American

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[55]This written articulation of the purposes and policy of the law school's affirmative action program and description of the 1992 process was prepared in February 1994. *Johanson*, vol. 6 at 45-46; *Yudof*, vol. 20 at 30-31.

students;

To achieve compliance with the American Bar Association and the American Association of Law Schools standards of commitment to pluralist diversity in the law school's student population.

D-362. Although all are important and laudable goals, the law school's efforts, to be consistent with the Equal Protection Clause, must be limited to seeking the educational benefits that flow from having a diverse student body and to addressing the present effects of past discriminatory practices. *See Bakke*, 438 U.S. at 313; 98 S. Ct. at 2760 (environment fostering robust exchange of ideas makes goal of diversity "of paramount importance in the fulfillment of [a university's] mission"); *United States v. Paradise*, 480 U.S. 149, 167, 107 S. Ct. 1053, 1064 (1987) ("The government unquestionably has a compelling interest in remedying past and present discrimination by a state actor."); *Podberesky*, 956 F.2d at 57 (race- related remedy may be used in attempt to remedy effects of past discrimination). Accordingly, the Court will evaluate the program in light of these goals.[56] The plaintiffs do not dispute that under the holding of *Bakke*, obtaining the benefits that flow from a racially and ethnically diverse student body is a compelling interest

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[56]Notwithstanding the personal views of this judge, it appears the goal of increasing the number of minority members in the legal profession and judiciary of Texas is not a legally sufficient reason to justify racial preferences under fourteenth amendment analysis. *See Croson*, 488 U.S. at 496-98, 109 S. Ct. at 723-24. Further, the desires and goals of a private entity such as the ABA or AALS, though important considerations for an accredited law school, do not provide sufficient justification for racial classifications. Similarly, Texas' "consent decree" with the OCR, though having evidentiary value in terms of past discrimination in Texas' higher education system, is not, in and of itself, a valid justification.

justifying the use of racial preferences.[57] Nevertheless, the plaintiffs suggest that under more recent Supreme Court decisions, the only compelling interest recognized for race-conscious programs is remedying the past effects of racial discrimination.[58] However, none of the recent opinions is factually based in the education context and, therefore, none focuses on the unique role of education in our society.[59] Absent an explicit statement from the Supreme Court overruling *Bakke*, this Court finds, in the context of the law school's admissions process, obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a

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[57]The plaintiffs do contend the law school's affirmative action program is not narrowly tailored to meet the objective of diversity, an issue the Court will address below.

[58]In support of this proposition, the defendants cite *Croson*, 488 U.S. at 493, 109 S. Ct. at 722 ("Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility."), and dissenting opinions from *Metro Broadcasting* and *Johnson v. Transportation Agency, Santa Clara, California*. *See Metro Broadcasting*, ___ U.S. at ___, 110 S. Ct. at 3035 (O'Connor, J., dissenting); *Johnson*, 480 U.S. 616, 673-75, 107 S. Ct. 1442, 1473-1474 (Scalia, J., dissenting).

[59]The Supreme Court recognized the vital role education plays in our society in *Brown v. Board of Education*:

> [Education] is the very foundation of good citizenship. Today it is a principal instrument for awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to cover succeed in life if he is denied the opportunity of an education.

Brown v. Board of Educ., 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954).

sufficiently compelling interest to support the use of racial classifications.

The defendants presented evidence, which included the testimony of deans from law schools across the country and the testimony of former and current law students, that the benefit to the law school educational experience derived from a diverse student population is substantial. *See, e.g., Brest,* vol. 22 at 22-23; *Stein,* vol. 18 at 20-21; *Bollinger,* vol. 16 at 23-26; *Spector,* vol. 15 at 9-10. Additionally, several professors testified regarding the educational benefit of having a diverse group of students in the classroom setting. *See, e.g., Goode,* vol. 9 at 20-21; *Yudof,* vol. 21 at 59-60. According to the evidence presented at trial, without affirmative action the law school would not be able to achieve this goal of diversity. Had the law school based its 1992 admissions solely on the applicants' TIs without regard to race or ethnicity, the entering class would have included, at most, nine blacks and eighteen Mexican Americans.[60]

Although under current law the goal of diversity is sufficient by itself to satisfy the compelling governmental interest element of strict scrutiny, the objective of overcoming past effects of discrimination is an equally important goal of the law school's affirmative action program. The plaintiffs have asserted that any past discrimination against blacks occurred so long ago, it has no present effects and that the law school has never discriminated against Mexican Americans. [61] The plaintiffs further assert the

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[60]D-441. The Court believes such meager representation would be woefully inadequate in a state university supported, in part, by revenues from *all* state residents. Further, the Court concurs with the defendants that diversity requires more than token representation of minorities; strict reliance on the TIs for admission would not further the goal of diversity.

[61]The plaintiffs' expert, James Armor, a senior fellow at the Institute of Public Policy, George Mason University, in Fairfax, Virginia, testified

Court should limit its review of past discrimination to official acts and policy of the University of Texas law school and should not consider discrimination in Texas' educational system as a whole. As support for this contention the plaintiffs cite *Croson*, in which the Supreme Court struck down a city set-aside program that required thirty percent of city contracts to be subcontracted to minority businesses. 488 U.S. at 499, 109 S. Ct. at 724 ("Like the claim that discrimination in primary and secondary school justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.").

Recently, however, the Supreme Court held that a system of higher education is under an affirmative duty to eliminate every vestige of racial segregation and discrimination in its educational system and to reform those policies and practices that required or contributed to separation of the races. *United States v. Fordice*, ___ U.S. ___, 112 S. Ct. 2727, 2743 (1992). Thus, it appears the Supreme Court has recognized that the restrictions it has applied in ascertaining the present effects of past discrimination in the employment context, specifically the prohibition against remedying effects of "societal discrimination" and discrimination implemented by another governmental unit, are not appropriate in the education context. *See also Podberesky v. Kirwan*, 838 F. Supp. 1075, 1098 & n. 79 (D. Md. 1993). "Applicants do not arrive at the admissions office of a professional school in a vacuum," and, in fact, have ordinarily been students in an educational system for sixteen years. *Geier v. Alexander*, 801 F.2d 799, 809 (6th Cir. 1986). The Court believes, therefore, the residual effects of past discrimination in a

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there are no present direct effects of past discrimination in Texas' educational system. *Armor*, vol. 10 at 45-48. Armor testified the only cities in Texas he has visited are Dallas and Houston. *Armor*, vol. 11 at 41. The Court does not find Armor to be a credible witness.

particular component of a state's educational system must be analyzed in the context of the state's educational system as a whole. The State's institutions of higher education are inextricably linked to the primary and secondary schools in the system. Accordingly, this Court has not limited its review to the law school or Texas' higher education system in evaluating the present effects of past discrimination.[62] However, were the Court to limit its review to the University of Texas, the Court would still find a "strong evidentiary basis for concluding that remedial action is necessary." *Podberesky v. Kirwan*, 956 F.2d at 55.

As discussed above, Texas' long history of discrimination against blacks and Mexican Americans in public education is chronicled in court opinions, the findings of the OCR, and the continuing desegregation suits against the State.[63] The State of Texas engaged in overt discrimination against blacks until the practices were forcibly dismantled in the relatively recent past. Discrimination in education was at the center of official discrimination against black Texans. Additionally, the University of Texas has a history of racial discrimination.

Similarly, the State has subjected Mexican Americans to

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[62]*See also Ayers v. Allain*, 893 F.2d 732, 751 (5th Cir. 1990):

> *Brown* states that the stigmatizing effects of segregation are not created by legally compelled attendance but rather from the vestiges of legally compelled separation. Thus the lesson of *Brown* is that the malignancy of apartheid does not vanish in state-sponsored forums simply because attendance is voluntary and admittance race-neutral.

[63]*See, e.g., League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 878 (1994) ("Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute . . . .").

discriminatory practices in the education area as reflected in the findings of unlawful *de jure* discrimination in the numerous desegregation lawsuits. Less documentation exists of overt official discrimination against Mexican Americans than against blacks at the University of Texas. However, the legacy of Texas' discriminatory practices continues to hinder the University of Texas' efforts to attract qualified Mexican American students.

In recent history, there is no evidence of overt officially sanctioned discrimination at the University of Texas. The evidence reflects that the university has made genuine efforts in the last decade to end discrimination by recruiting and maintaining minority faculty members and students and condemning racial incidents occurring on campus or involving student organizations. Despite these efforts, however, the legacy of the past has left residual effects that persist into the present. The evidence presented at trial indicates those effects include the law school's lingering reputation in the minority community, particularly with prospective students, as a "white" school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities.

The university's efforts to recruit minorities has led to a modest increase in the number of minorities attending the law school. However, admissions and recruitment personnel face difficulties in attracting qualified minorities to enroll in the law school. These difficulties stem from negative perceptions of the racial climate at the law school as a result of past discrimination.[64] Because of the law school's legacy of discrimination, it must overcome a perception that it is a "white institution." *Wright*, vol. 19 at 33-34.

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[64] *Hamilton*, vol. 2 at 49-50, 52-53; *Wright*, vol. 19 at 33-36. *Sweatt v. Painter* is often studied in undergraduate courses and contributes to undergraduate minorities' perception of the University of Texas as an institution that does not welcome minorities. *Wright*, vol. 19 at 33-36; *Romo*, vol. 17 at 64.

Recent racial incidents, although not officially sanctioned by the school, have reinforced the perception that the university is hostile to minorities and has hurt its ability to recruit minority students. *Wright*, vol. 19 at 29-31. An affirmative action program is therefore necessary to recruit minority students because of the past discrimination.

The effects of the State's past *de jure* segregation in the educational system are reflected in the low enrollment of minorities in professional schools, including the law school. The OCR findings and the OCR's continuing review of Texas' efforts to desegregate demonstrate the pervasive nature of past discrimination in the higher education system.[65] As a result of policies of official discrimination in the Texas higher education system, a generation of blacks and Mexican Americans who are the parents of those presently of law school age were denied meaningful opportunities for higher education. *Glenn*, vol. 23 at 51-53; *Romo*, vol. 17 at 63-64; *Wright*, vol. 19 at 45-47. The denial of these opportunities to the generation of minority parents bears a causal connection to the diminished educational attainment of the present generation. *Glenn*, vol. 23 at 51-52; *Romo*, vol. 17 at 53-54.

Further, many public schools in Texas continued to have a substantial degree of racial and ethnic segregation during the 1970s and 1980s, the decades in which the majority of 1992 law school applicants attended primary and secondary schools. *Glenn*, vol. 23 at 48-51; D-379. This segregation has handicapped the educational achievement of many minorities. The ultimate effect of the inferior educational opportunity, combined with the lower socioeconomic status of minorities in Texas, is a disproportionately smaller pool of minority applicants to law school. D-379 at 6-7; *see also supra*

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[65]The plaintiffs contend the OCR's findings are invalid because the OCR did not apply the standards recently set forth by the Supreme Court in *Fordice*. However, neither the validity of the OCR investigation, nor the retroactive application of *Fordice* is the issue before this Court.

note 3.

In addition, some minority students enrolled in the law school feel isolated even with the current commitment to affirmative action and diversity and are often hesitant to participate in class discussion when they are the sole minority or one of a few minorities in a class. *Longoria,* vol. 15 at 32-34; *Rodriguez,* vol. 17 at 24-25. Some minority students continue to perceive a hostile racial environment on the campus, which they assert is reflected in insensitive comments by fellow students and faculty. *Bell,* vol. 14 at 16, 29- 34; *Escobedo,* vol. 14 at 41-42; *Longoria,* vol. 15 at 32-24.

Accordingly, despite the plaintiff's protestations to the contrary, the record provides strong evidence of some present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole. Therefore, the Court finds the remedial purpose of the law school's affirmative action program is a compelling governmental objective.

2. Narrowly Tailored.—The Court must next decide if the admissions process was narrowly tailored to achieve the goals of diversity and overcoming the present effects of past discrimination. This determination requires the application of four factors: the efficacy of alternative remedies; the flexibility and duration of the relief; the relationship of the numerical goals to the percentage of minorities in the relevant population; and the impact of the relief on the rights of third parties. *See United States v. Paradise,* 480 U.S. 149, 171, 107 S. Ct. 1053, 1066 (1987).

The defendants have shown it is not possible to achieve a diverse student body without an affirmative action program that seeks to admit and enroll minority candidates. *Brest,* vol. 22, at 15. As stated above, in 1992, the entering class would have included at most nine blacks and eighteen Mexican Americans, had the review of minorities been limited to those applicants in the presumptive admit and discretionary zones for white applicants. D-441; *Yudof,*

vol. 21 at 44; *Johanson*, vol. 6 at 38. These numbers reflect the maximum potential and assume no adverse affect on the number of applicants stemming from the abandonment of affirmative action.

Further, the record indicates the ultimate effect of abandoning affirmative action at the law school would be to redirect minorities to the historically separate state law school at Texas Southern University, thereby resegregating the law school.[66] Alternatives, such as minority scholarships and increased minority recruitment, while effective tools in conjunction with the affirmative action program, would not be effective means by themselves to meet the compelling governmental interests of true diversity and remedying the effect of past *de jure* segregation. In fact, the record in this case demonstrates that, without affirmative action, the perception of the law school as a "white" institution would be exacerbated, which would compound the difficulties of attracting top minority students. *Wright*, vol. 19 at 36-37; *Goode*, vol. 9 at 19; *Rodriguez*, vol. 17 at 25.

The evidence shows that despite genuine efforts to end discrimination, the legacy of the past continues to hinder the law school's efforts to attract highly qualified minority students. Accordingly, the Court finds affirmative action in the law school's admissions program is an effective and necessary means to overcome the legacy of the past and to achieve the diversity

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[66] *Ashworth*, vol. 12 at 44-45; D-432; D-453; D-454. In 1971, the year following the Board of Regents disapproval of the law school's participation in the CLEO program, the law school entering class had no blacks. As late as 1974 only ten of the law school's 1600 students were black. *Wright*, vol. 19 at 31-33. Texas Southern University, the law school Texas created to avoid integration of the law school, enrolls almost 50% of all entering minority law students in Texas. This percentage would increase dramatically in the absence of the law school's affirmative action program. *Wright*, vol. 19 at 21-22; *Ashworth*, vol. 12 at 44-45; D-432; D-452; D-453.

necessary for a first-class university.

The plaintiffs argue the admissions program establishes the functional equivalent of an impermissible quota system in which the law school attempts to camouflage quotas through the use of the term "goals." The plaintiffs contend because the admissions committee knows the approximate number of students in an incoming class, the five percent black and ten percent Mexican American figures translate into specific numbers.

The admissions data from the past ten years shows variations in the admission figures for the two groups receiving admissions preferences at the law school-- blacks and Mexican Americans. The data reflects that between 1983 and 1993, the percentage of black admissions varied from a low of 3.2 percent, occurring in 1987, to a high of 9.3 percent in 1983. The percentage in 1992 was 8.0 percent. Mexican American admissions varied from a low of 10 percent, occurring in both 1983 and 1993, and a high of 14.3 percent occurring in 1984. The percentage in 1992 was 10.7.[67]

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[67]The admissions data from 1983 to 1993 reflects the following minority admissions, both in percentages and actual numbers of students:

Year	Black	Mexican American
1983	9.3 (47)	10.0 (51)
1984	6.2 (32)	14.3 (74)
1985	4.6 (25)	11.2 (61)
1986	4.4 (24)	13.1 (71)
1987	3.2 (17)	10.2 (55)
1988	7.0 (44)	10.7 (60)
1989	6.0 (35)	11.4 (58)
1990	7.1 (39)	11.6 (64)
1991	6.9 (35)	10.6 (54)
1992	8.0 (41)	10.7 (55)
1993	5.9 (31)	10.0 (53)

An illegal quota, as defined by the Supreme Court, exists when a fixed number of seats are set aside or an unyielding number is set to achieve a goal. *See Bakke*, 438 U.S. at 288, 98 S. Ct. at 2747 (defining quota as fixed number of seats set aside); *see also Metro Broadcasting*, 497 U.S. at 599, 110 S. Ct. at 3027 (equating quota with a "fixed quantity set aside"); *Croson*, 488 U.S. at 499, 109 S. Ct. at 724-25 (describing thirty percent minority set-aside as rigid and unyielding quota); *Fullilove v. Klutznick*, 448 U.S. 448, 498, 100 S. Ct. 2758, 2785 (1980) (equating quota with set-aside). Though it is evident from the admissions figures that the percentages of desired minorities in a class derived from the OCR investigation served as guidelines, the law school did not rigidly and inflexibly apply the numbers. Instead, the percentages fluctuate randomly, albeit within a relatively narrow range, and show no consistent pattern of increase. In some years, the law school has failed to meet its goals because of the relatively weak strength of the minority applicant pool. *Goode*, vol. 9 at 13-17. No evidence was presented at trial that the law school granted a set-aside for any particular group or that competition for any specific seat in the class was closed to some students because of race or ethnicity.[68] Accordingly, the Court finds the 1992 admissions process did not use an illegal quota but was, in fact, flexible in achieving its goals based on the strength of the minority applicant pool.

As for duration, the law school has not stated precisely how long it envisions maintaining its affirmative action admissions program. However, in the 1990s, as the minority applicant pool improved, the admissions committee made the decision not to admit greater numbers of minority students but to attempt to close the gap

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[68] The law school maintains racially segregated "wait lists," which the plaintiffs contend the law school uses to adjust the racial composition of the incoming class to meet its goals. However, the evidence at trial showed that there is no "last seat," as in *Bakke*, for which an applicant's race is the deciding factor. *See, e.g., Johanson*, vol. 4 at 43.

in credentials of minority and nonminority students. *Wellborn,* vol. 24 at 31-35; *Goode,* vol. 9 at 7, 17-18. Therefore, in 1992, despite a significant increase in the number of minority applicants from the previous years, the law school's minority admissions remained relatively stable. *Johanson,* vol. 6 at 13-14; P-47; D-438; D-439.

The current objective of the law school, as articulated at trial, is to continue to narrow the gap to the point where affirmative action will not be required to achieve a representative percentage of minorities in the entering classes.[69] The evidence reflects that the law school admissions committee regularly reviews and adjusts the remedy to evaluate its necessity and efficacy.[70] Certainly, an indefinite program would violate the Equal Protection Clause. However, the law school's use of the program until the OCR has determined Texas is in compliance with Title VI and until the gap in minority and nonminority credentials has narrowed such that the State will remain in compliance with Title VI without the need for affirmative action does not offend the Constitution. *See Podberesky,* 764 F. Supp. at 376.

The third factor, the relationship of the numerical goals to the relevant population, is easily satisfied under these facts. The law school has not attempted to set goals that reflect the percentage of minorities in the general population or the percentage of minorities attending college. Instead the law school's goals for minority

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[69]*See Goode,* vol. 9 at 32 ("My position on the committee for many years has been, we ought to work and strive to decreasing the gap, little by little if we have to, but one day to the point where, in fact, we won't have such a gap, where we can truly have a race-blind system of admission. We're not there."); *see also Wellborn,* vol. 24 at 35; P-1.

[70]The evidence shows that the qualifications of minority applicants today are roughly equivalent to the qualifications of nonminority applicants 20 years ago. D-433. These figures demonstrate the progress that has occurred in the qualifications of minorities applying for law school. *Glenn,* vol. 23 at 52.

enrollment are generally in line with the percentages of black and Mexican American college graduates in the State of Texas. These goals stem from the OCR investigation and the resulting Texas Plans. *Goode,* vol. 9 at 12-13; *Johanson,* vol. 4 at 9-12. They are reasonable and logically related to the size of the relevant pool of minority prospects for higher education.

The final factor, the impact of the procedure on the rights of innocent third parties, is the most difficult to evaluate. By definition, if one person is given preferential treatment based on race or ethnicity to overcome a heritage of past societal wrongs, another person is penalized. However, the person penalized or that person's ancestors may never have discriminated against the preferred race or ethnicity. Although the past history of societal discrimination in certain institutions may justify the remedy, in the end, individuals pay the price. Therefore, it is imperative that the mechanics of any program implementing race-based preferences respect and protect the rights of individuals who, ultimately, may have to sacrifice their interests as a remedy for societal wrongs.

In 1992, admissions subcommittees of three reviewed all the nonminority files. With the exception of Johanson and Hamilton, none of the members of the subcommittees reviewed the individual minority files. Nonminority applicants receiving no votes were denied admission without any further consideration or any direct comparison to minority applicants. In fact, as early as February 28, 1992, the law school had sent denial letters to 201 resident applicants, none of whom were black or Mexican American. P-43. By March 24, 1992, 718 denial letters had been sent to resident applicants, all to nonminority applicants. P-52. The law school did not reject any minority applicants until later in the admissions process. P-60.

The lack of individual comparison between minority and nonminority files resulted primarily from the separate admissions procedures for minorities and nonminorities in the discretionary

zone; this is the aspect of the procedure that is at issue with respect to the four plaintiffs in this cause, who were evaluated in the discretionary zone. However, the setting of different presumptive denial lines for minorities and nonminorities creates a similar problem: some nonminority applicants who fell below the nonminority presumptive denial line, though having a higher score than minority applicants placed in the discretionary zone, were rejected early in the process with no comparison to the individual minority applicants.[71] Further, although a presumptive denial score

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[71]The use of different presumptive admission lines to identify the top candidates in the different groups does not present the same problem for several reasons. First, the evidence shows that Johanson reviewed all candidates in the top category, both minority and nonminority. Additionally, those applicants that were not offered admission from this category were not denied admission but moved to the discretionary zone. Further, Johanson testified to the necessity of making offers of admissions to the top candidates in the minority pools as soon as possible because of the small pool of qualified applicants and the nationwide competition for them. A tool that considers the disparity in past educational opportunity based on historical discrimination to assist in attracting the top minorities does not create an undue burden on the rights of nonminorities when appropriately used. Conversely, the use of differing presumptive denial lines effectively removed some nonminority applicants from consideration early in the process without being provided a general, much less individual, comparison with a fully developed pool of minority applicants. One or two separate reviewers from the general admissions committee unilaterally made determinations with regard to these applicants. However, none of the plaintiffs in this lawsuit was affected directly by this aspect of the 1992 procedure. Further, the new admissions procedure adopted by the law school will no longer use presumptive denial lines to preclude comparison of applicants. *See infra* note 87. The Court, therefore, need not address the issue. If the issue were before the Court, the Court would find this aspect of the procedure suffers from the same infirmity that use of the minority subcommittee created in the discretionary zone—lack of individual comparison between

was established for minorities, in 1992, every minority applicant not admitted from the presumptive admit category was treated as if in the minority discretionary zone. P-103.

The defendants defend the system used in 1992 as more effective in controlling the use of race for limited, legitimate purposes than the previous procedure of commingling minority and nonminority files in the stacks of thirty, a procedure that allowed individual reviewers complete discretion on the extent, if any, to implement affirmative action. *Wellborn,* vol. 24 at 8-17. The defendants assert the 1992 process was also more efficient in that minority files were reviewed by the persons most experienced in reviewing and evaluating minority files. *Goode,* vol. 9 at 3. The defendants concede that in 1992, with the exception of Johanson and Hamilton, no members of the general admissions committee reviewed individual minority files. However, they contend that the full committee was sufficiently apprised of the relative strengths of the minority and nonminority applicant pools through information provided by the minority subcommittee. Because the minority subcommittee shared this information with the full committee, the defendants argue that the full committee could reach a consensus on the weight to give race in the admissions process and evaluate the nonminority stacks of files with the relative strengths of the applicant pools in mind. *Wellborn,* vol. 24 at 10, 14-16; *Goode,* vol. 9 at 8-9. The defendants also defend the law school's process as consistent with similar processes used at major law schools across the country.[72] However, review of admissions procedures

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minority and nonminority applicants.

[72]The defendants imply that because the law school's affirmative action is fundamentally similar to that used at the major law schools around the country, it is constitutional. The evidence, however, reflects that while there are similarities, the other programs differ significantly from that at issue in this cause. Judith Wegner, Dean of the University of North Carolina School of Law, testified by deposition that the

for equal protection violations requires a fact-specific inquiry. The fact that other schools may use processes with similar components does not resolve the issue of whether the defendants deprived the four plaintiffs in this cause of equal protection under the law.

In *Bakke,* Justice Powell stated that although race or ethnicity could be a "plus" factor in consideration of a particular applicant, race or ethnicity should "not insulate the individual from comparison with all other candidates for the available seats." *Bakke,* 438 U.S. at 317, 98 S. Ct. at 2762. Justice Powell further discussed the importance of assuring applicants that they were treated as individuals in the admissions process:

The applicant who loses out on the last available seat to

University of North Carolina School of Law does not set separate presumptive admission and denial scores based on race, does not have waiting lists segregated by race, and does not have separate committee review based on race. *Wegner depo.* at 48-49. Robert Stein, Dean of the University of Minnesota Law School, testified that the University of Minnesota uses mechanisms in the admissions procedure similar in function to those used by the law school. However, all applicants offered admission at the University of Minnesota, with the exception of those offered "automatic" admission based on high indices, are ultimately reviewed by the full admissions committee. *Stein,* vol. 18 at 12. The minority subcommittee does not have authority to admit applicants, only to recommend specific applicants to the full committee. *Stein,* vol. 18 at 48. Paul Brest, Dean of the Stanford Law School, testified his school uses a system comparable to that used by the law school, with a single admissions chair who has ultimate discretion on all admissions. *Brest,* vol. 22 at 19. Instead of a using a minority subcommittee, Stanford has one person that reviews minority files and makes recommendations to the admissions chair. *Id.* at 8-19. Until recently, that person reviewed only minority files. However, as the result of a recent settlement with OCR, the person began reviewing some nonminority files so that she would have a better sense of the entire pool of applicants and be able to make more appropriate comparisons between the applicants. *Id.* at 39.

> another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. at 318, 98 S. Ct. at 2762. The defendants contend this express language is limited in its application to only those affirmative action programs that, like the one at issue in *Bakke,* use a quota system to achieve diversity. They assert that Justice Powell's reasoning calling for a one-on-one comparison may have application when the primary objective is to obtain a diverse class based on a number of different qualifications. However, this reasoning does not apply, according to the defendants, when a primary objective is to remedy past discrimination. In such circumstances, the defendants maintain individuals need not be compared one-to-one, as long as the admissions committee had a generalized knowledge of the strengths of the minority and nonminority applicant pools.[73] The Court disagrees.

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[73]Additionally, the defendants assert that nothing in the case law following *Bakke* suggests that individual comparison of files is required in an admissions process redressing past discrimination, and in fact, indications exist to the contrary. *See Croson,* 488 U.S. at 519, 109 S. Ct. at 735 (Kennedy, J., concurring) (narrow tailoring standards should not be so strict as to chill state's ability to voluntarily eliminate results of past discriminatory actions); *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 471, 106 S. Ct. 3019, 3047-48 (1986) (narrow tailoring does not require specific beneficiaries of affirmative action be victims of past discrimination). The defendants assert that requiring a one-to-one comparison of over 4000 applicants a year would be incredibly

Overcoming the effects of past discrimination is an important goal for our society. The preservation and protection of individual rights are equally important. Society must be careful not to ignore the latter to achieve the former, for to do so would serve only to perpetuate actions of the type affirmative action attempts to redress. Two wrongs do not make a right; nor does blatant discrimination cure the ills of past discrimination. Indeed, affirmative action that ignores the importance of individual rights may further widen the gap between the races that the law school so diligently attempts to close and create racial hostility. The only proper means of assuring that all important societal interests are met, whether in the context of creating diversity or redressing the ill effects of past wrongs, is to provide a procedure or method by which the qualifications of each individual are evaluated and compared to those of all other individuals in the pool, whether minority or nonminority.

The law school owes a duty to the citizens of Texas to allow access to a legal education to the best qualified applicants. This does not imply that those applicants with the highest numbers or most prestigious pedigrees are necessarily the best qualified. A multitude of factors, as discussed by Justice Powell in *Bakke*, should be considered in developing the best qualified class from a

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burdensome. However, the Court finds no reason, when evaluating affirmative action in the educational context, that the protection afforded individuals under the Fourteenth Amendment should change based on the governmental goal that is to be achieved. Further, the defendants, citing *Bakke*, have asserted diversity as a constitutionally valid goal of the law school's affirmative action program. *Bakke* gives no indication that the burden to a school in implementing a constitutionally valid program should be considered as a reason to diminish the need for individual comparison. Additionally, more recent case law has made it clear that administrative convenience cannot support a finding that an affirmative action program is narrowly tailored to remedy the effects of past discrimination. *Croson*, 488 U.S. at 508, 109 S. Ct. at 729-730.

given group of applicants.[74] "Indeed, the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Id.* at 317-18, 98 S. Ct. at 2762. To achieve the compelling governmental goal of remedying past discrimination, race and ethnicity are factors that deserve "pluses" in the weighing of qualifications. To achieve the compelling governmental goal of diversity, nonobjective qualifications of nonminorities and minorities alike may deserve a similar "plus" factor.[75] Only by comparing the entire pool of individual applicants can both these goals be achieved and the best qualified class of entering law students be admitted.

The law school's 1992 admissions procedure, in theory, was designed to select the best qualified applicants from the thousands of applications it received. In 1992, the law school's affirmative action program involved a determination of those applicants who were the best qualified from the entire minority pool and an attempt to enroll sufficient numbers of those applicants in the entering class to satisfy the compelling governmental objectives at issue. The law

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[74]In addition to race, Justice Powell suggested "[s]uch qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." 438 U.S. at 318, 98 S. Ct. at 2762.

[75]A nonminority applicant from a disadvantaged background, although offered admission to prestigious colleges, who elects to attend less-prestigious schools for economic reasons but nonetheless performs well, seems to be penalized under the current system for not having financial means or opportunities commensurate with other nonminorities dealt a different lot in life. Therefore, the affirmative action program, as applied in 1992, seems to have had the somewhat ironic effect of affecting the rights of less advantaged and, indeed, even disadvantaged, nonminorities rather than the group of nonminorities as a whole.

school evaluated all nonminority applications through a separate process, with the goal of admitting the best qualified nonminorities. The defendants maintain this bifurcated process does not violate the Fourteenth Amendment because affirmative action is lawful and those minorities selected are evaluated against nonminority applicants by comparison of the general qualifications of the two pools of applicants. The process, however, incorporates no meaningful evaluation between the applicants selected from each pool—a crucial element for protection of individual rights.

The Court holds that the aspect of the law school's affirmative action program giving minority applicants a "plus" is lawful. But the failure to provide comparative evaluation among *all* individual applicants in determining which were the best qualified to comprise the class, including appropriate consideration of a "plus" factor, created a procedure in which admission of the best qualified was not assured in 1992. Under the 1992 procedure, the possibility existed that the law school could select a minority, who, even with a "plus" factor, was not as qualified to be a part of the entering class as a nonminority denied admission. Thus, the admission of the nonminority candidate would be solely on the basis of race or ethnicity and not based on individual comparison and evaluation. This is the aspect of the procedure that is flawed and must be eliminated.

The constitutional infirmity of the 1992 law school admissions procedure, therefore, is not that it gives preferential treatment on the basis of race but that it fails to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race.[76] Because the law school's 1992 admissions

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[76]The record shows that two of the plaintiffs' applications were reviewed by members of the minority subcommittee who had familiarity with both pools of applicants, minority and nonminority. Initially, Johanson reviewed Hopwood's file early in the process before the entire pool of applications had developed. After he moved her to the

process was not narrowly tailored, the Court finds the procedure violated the Equal Protection Clause of the Fourteenth Amendment.

C. Effect of Process on Plaintiffs

The next issue the Court must address is whether, but for the manner in which the law school improperly considered race in its 1992 admissions procedure, the plaintiffs would have been offered admission. The defendants argue that the burden is on the plaintiffs to prove they would have been admitted. The plaintiffs argue that once they prove a constitutional violation, the burden shifts to the defendants to establish there was no but-for causation between the unconstitutional procedure and the denial of admission to each plaintiff.

Generally, in cases where a plaintiff establishes a constitutional deprivation, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for the action. *See, e.g., Carey v. Piphus,* 435 U.S. 247, 263, 98 S. Ct. 1042, 1052 (1978) (plaintiff seeking damages for due-process violation must show injuries resulted from denial of due process, not from corresponding justifiable deprivation); *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977) (once employee established conduct constitutionally protected, burden shifted to

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discretionary zone, a subcommittee of three that included Hamilton reviewed her file. Elliott's file was reviewed by a subcommittee of three that included Johanson. Arguably, because Johanson and Hamilton had familiarity with individual minority applicant files, the procedure as applied to these two plaintiffs was not impermissible. However, because the other reviewers on the subcommittees had no familiarity with individual minority files, the Court finds the constitutional violation applies to all four plaintiffs. Additionally, the fact that these plaintiffs were reviewed by persons familiar with the entire pool was an inadvertent effect of Johanson's and Hamilton's dual roles and the random shuffle of the files into reviewing stacks; it did not result from the design of the procedure.

employer to show it would have reached same decision). Justice Powell's opinion in *Bakke* suggests the same holds true in Title VI discrimination suits when evidence of alternative reasons exists.[77] The Supreme Court has recently taken the analysis one step further in the context of Title VII discrimination cases and held that the failure of a defendant to produce credible evidence of legitimate nondiscriminatory reasons is insufficient to support a finding of discrimination because the "ultimate burden of persuasion" remains at all times with the plaintiff. *See St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, ___, 113 S. Ct. 2742, 2749 (1993). In making this

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[77]The trial court in *Bakke* placed the burden of proof on Bakke. Therefore, although the court found the Davis program violated Bakke's fourteenth amendment rights, it denied him injunctive relief because he had failed to prove he would have been admitted in the absence of the impermissible program. On appeal, the Supreme Court of California, analogizing Bakke's situation to that of a plaintiff under Title VII, ruled that because Bakke established the university had discriminated against him, the burden of proof shifted to the university to prove that it would not have admitted him in the absence of the special admissions program. *Bakke v. Regents of Univ. of Cal.*, 553 P.2d 1152, 1172 (Cal. 1976). Because the university conceded its inability to carry the burden, the California court ordered Bakke's admission. *Id.* On review, the Supreme Court of the United States noted the burden shift but stated that because the university had not challenged that aspect of the decision, the issue of the proper placement of the burden of proof was not before it for consideration. *Bakke*, 438 U.S. at 280 n.13, 98 S. Ct. at 2743 n.13. At the end of his opinion, Justice Powell, affirming the injunction, noted that remanding the case would serve no useful purpose in light of the university's concession that it could not meet the burden imposed upon it by the burden shift. *Id.* at 320, 98 S. Ct. at 2764. In distinguishing *Bakke* from *Mt. Healthy City Board of Education v. Doyle*, Justice Powell noted that there was no question that race had been the reason for Bakke's rejection and no record existed in *Bakke* that legitimate alternative grounds for the university's decision existed. *Id.* at 320 n.54; 98 S. Ct. at 2764 n.54.

clarification, Justice Scalia stated that a court has no authority to impose liability upon an entity for alleged discriminatory practices unless a factfinder determines, according to proper procedures, that the entity has unlawfully discriminated. *Id.* at ___, 113 S. Ct. 2751. Courts have borrowed the burden of proof standards formulated for Title VII in deciding claims brought under statutes prohibiting discrimination by educational institutions receiving federal funding. *See, e.g., Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1404 (11th Cir. 1993) (Title VI disparate impact claim). *But see Cohen v. Brown Univ.*, 991 F.2d 888, 901-02 (1st Cir. 1993) (Title IX plaintiff bears burden of showing disparity and unmet interest).[78]

The Court finds that the cue in Justice Powell's opinion and the holdings of other constitutional cases suggest that a burden allotment similar to that in Title VII cases is appropriate. Therefore, because the plaintiffs established a prima facie case--they proved the law school's 1992 admissions procedure was constitutionally flawed—the burden shifted to the defendants to establish legitimate grounds for the decision not to admit these plaintiffs, notwithstanding the procedure followed. Unlike the university in *Bakke*, the defendants in this cause did not concede the plaintiffs would have been admitted had their applications been compared on a individual basis to minority files. Instead, they offered legitimate, nondiscriminatory reasons for denying each of the plaintiff's applications. D-332 (Hopwood, Elliott); D-334 (Hopwood, Carvell); D-335 (Carvell, Rogers); D-336 (Carvell). Further, a statistical analysis of the 1992 admissions data supports the defendants' assertion of the non-race based weaknesses in the plaintiffs' applications. D-338 at A-60–A-71.

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[78]The court in *Cohen* held that the burden shift applicable to Title VII cases should not apply to Title IX cases, a statute similar to Title VI. Among the reasons the court offered were the different scope and purpose of the two statutes and the largely aspirational goal of Title IX in comparison to the peremptory goal of Title VII. 991 F.3d at 902.

The plaintiffs placed in evidence a chart created by the law school that depicts the TIs of all 1992 applicants and whether they were offered or denied admission. *See* P-139. The chart distinguishes minority and nonminority applicants, as well as residents and nonresidents.[79] The chart emphasizes the disparity in TIs between resident minority and nonminority applicants: the highest nonminority TI was 220, the highest black TI was 199 (the same as Hopwood's TI), and the highest Mexican American TI was 208. In the resident nonminority category, of fifty-one applicants with TIs of 199, six were denied admission. Additionally, the law school denied admission to ten nonminorities with TIs higher than Hopwood's TI. With regard to minority applicants with TIs of 199, the chart shows one black applicant, who was admitted, and three Mexican American applicants, all who were admitted.[80] With regard to a TI of 197, the TI shared by the other three plaintiffs, of fifty-seven resident nonminority applicants, the law school denied admission to nineteen. Only one black resident fell in this category, who was admitted. No Mexican-American applicants had a TI of 197.

On the other end of the scale, out of four black resident applicants with a TI of 185, one was denied admission. However, the law school offered admission to one nonminority resident with the same TI. Applicants with the lowest TI offered admission were

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[79]The Court has focused on the statistics for residents in this discussion. The Court notes the chart reflects across-the-board higher numbers for nonresidents and correspondingly more difficult thresholds for admittance.

On the chart, "D" indicates denied, "A" indicates admitted, and "C" indicates canceled. For purposes of evaluation of the numbers, applicants in the "C" category are counted as admissions because they were admitted but canceled the acceptance. *See Johanson*, vol. 6 at 16.

[80]Two of the Mexican American applicants canceled.

all minorities.[81] However, the lowest nonminority TI was only a couple of points higher at 185.

There are many possible methods of evaluating the numbers on the chart and making comparisons of the applicants' relative TIs. The plaintiffs placed the chart in evidence to show their numerical standing above that of the majority of minorities offered admission. The Court agrees with the plaintiffs that the chart shows a significant disparity in TIs between the minority and nonminority pools. But the visual depiction of this disparity further reinforces the Court's finding that the evaluation of applicants must include other nonobjective factors to achieve the compelling governmental interest of overcoming the past effects of discrimination.

What the chart does not prove, however, is that race or ethnic origin was the reason behind the denial of admission to the plaintiffs. Although the plaintiffs had higher TIs than the majority of minority applicants offered admission, the evidence shows that 109 nonminority residents with TIs lower than Hopwood's were offered admission.[82] Sixty-seven nonminority residents with TIs lower than the other three plaintiffs were admitted.[83]

Additionally, the Court has reviewed the files of the four plaintiffs as well as the files placed in evidence of other applicants reviewed in the discretionary zone, both minority and nonminority. P-146 to P-150, P-155 to P-164 (white applicants admitted); P-224 to P-237 (black and Mexican American applicants admitted). Based on the applications in evidence, it appears the majority of applicants, both minority and nonminority, made considerable

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[81]Of five black applicants with a TI of 183, the law school admitted three; of eleven Mexican American applicants, the law school admitted two (one cancelled).

[82]Twenty-nine of these applicants canceled.

[83]Thirteen of these applicants canceled.

effort to inform the admissions committee of their special qualifications through extensive answers to the questions on the application form or through personal statements. *See* P-146 to P-150, P-155 to P-163, P-225 to P-237. Most files contained one, if not several, letters of recommendation. *See, e.g.,* P-155, 157, 158, 161, 225, 231, 233-236. In fact, of all the applications the Court reviewed, Hopwood's provides the least information about her background and individual qualifications and is the least impressive in appearance, despite her relatively high numbers. The files further reveal that both minorities and nonminorities were offered admission from the waiting lists. *See* P-146, 148, 156, 158, 162 (nonminority); P-231, 285 (minority).

In reviewing these files, the Court appreciates the difficulty of the task facing the admissions committee each year. Evaluation of applications involves both objective and subjective factors, and the Court is aware that some evaluators could use subjectivity to conceal discriminatory motives. As a general rule, however, judges are not as well suited to evaluate qualifications of applicants as those who are familiar with the process and have many years of experience evaluating applications. *See Odom v. Frank,* 3 F.3d 839, 847 (5th Cir. 1993). The Court's review revealed a group of applicants with varying backgrounds and accomplishments, but none so clearly better qualified, in the Court's view, as to require that individual's selection over that of another in the group.[84] The Court sees no disparities in the applications of the admitted minorities when compared to those of the plaintiffs "so apparent as virtually to jump off the page and slap [the Court] in the face." *Id.* Without such a disparity, the Court cannot and will not substitute its views for those of admission committee members with years of

[84]The Court notes that several of the applicants, some of which, in the Court's opinion, were weaker candidates, initially were denied admission but offered a position on the waiting list. They were offered admission relatively late in the process from the waiting list.

experience and expertise in evaluating the law school applications. *See id.*

Therefore, the Court finds the defendants have met the burden of producing credible evidence that legitimate, nondiscriminatory grounds exist for the law school's denial of admission to each of the four plaintiffs and that, in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process. The plaintiffs, who maintain the ultimate burden of persuasion, have failed to prove otherwise.[85] The Court simply cannot find from a preponderance of the evidence that the plaintiffs would have been offered admission under a constitutional system.

The Court is mindful that the ultimate burden on the plaintiffs is a difficult and, perhaps, almost impossible obstacle to overcome in a case of this nature.[86] However, the Court may not ignore the

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[85] In this cause, the plaintiffs' initial position was that any consideration of race in an admissions procedure is improper. Upon the Court's indication that such a position was untenable under the law, the plaintiffs redirected their efforts to proving the law school improperly used race in the admissions process. However, the plaintiffs' causation evidence consisted of a demonstration that many more minority students were admitted in 1992 than would have been under a strictly race-blind process and that, had the plaintiffs been minorities, there was a high probability they would have been offered admission. *Johanson,* vol. 5 at 37; vol. 6 at 18-19. This evidence, although proof of affirmative action, does not establish that the plaintiffs, who are not minorities, would have received sufficient votes to be offered admission if individual minority files had been reviewed by the general admissions committee.

[86] In closing argument, the plaintiffs' counsel stated the plaintiffs could not prove they were denied admission because of their race because it was an impossible burden to meet. *T. Smith,* vol. 26 at 11, 40. Justice Souter, in expressing concern for Title VII plaintiffs with similar burdens, criticized the holding in *St. Mary's* as establishing a scheme,

precedent of other constitutional cases because, as a practical matter, the burden may be too difficult for plaintiffs to overcome.

D. Relief and Damages

The plaintiffs seek declaratory and injunctive relief, as well as compensatory and exemplary damages. Because the Court has found the admission procedure the law school used in 1992 was not narrowly tailored in that it impermissibly and unnecessarily harmed the rights of the plaintiffs, the Court will enter a judgment providing the plaintiffs with their requested declaratory relief. Specifically, the Court will enter judgment that the law school's use of the separate evaluative processes for minority and nonminority applicants in the discretionary zone violated the Fourteenth Amendment.

However, "the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739, 104 S. Ct. 1387, 1395 (1984). As discussed above, the Court cannot find from a preponderance of the evidence that the plaintiffs would have been admitted under a constitutional system. The Court, therefore, will not order injunctive relief. Nor does the Court find prospective injunctive relief necessary in light of the law school's voluntary change to a

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which, as a practical matter, could never be met by a plaintiff without direct evidence of discrimination. *St. Mary's*, 113 S. Ct. at 2761 (Souter, J., dissenting).

The Court agrees that the plaintiffs have an impossible burden absent direct evidence. However, the difficulty does not stem from the unconstitutional aspects of the procedure alone but from the random shuffle of files into stacks of thirty, with each stack reviewed by different subcommittees of three. Under such a system, it is virtually impossible to establish the outcome of a comparison of the plaintiffs' applications against the other applicants, whether minority or nonminority.

procedure, which on paper and from the testimony, appears to remedy the defects the Court has found in the 1992 procedure.[87] Further, neither a plaintiff denied admission under the new system nor evidence of the practical application of the new procedure is before this Court.

Although the plaintiffs have failed to prove an injury-in-fact, they have proved they were deprived of their right to equal treatment. The appropriate relief for a denial of equal treatment in a discriminatory government program is a remedy mandating equal treatment.[88] Therefore, the Court finds it appropriate to allow the plaintiffs to reapply to the law school for admission in the 1995 entering class, if they so desire, without requiring them to incur further administrative costs, and for them to be fairly evaluated in comparison to all other applicants for admission in 1995.[89]

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[87]The law school followed the admissions procedure used in 1992 in 1993 and 1994. However, for selecting the 1995 entering class, the law school has established a new procedure that eliminates the minority subcommittee. D-363. All admissions decisions will be made by a small "administrative admissions group," which will be comprised of Johanson, Hamilton's successor, Dean Tonya Brown, and a faculty member who, as of the trial date, had not been selected. The new procedure will not use presumptive admission and denial scores. *Johanson*, vol. 6 at 34. The law school changed its procedure because "when one gets sued in federal court it catches one's attention." *Id.* at 57.

[88]*See Heckler*, 465 U.S. at 740, 104 S. Ct. at 1395. This remedy may be accommodated by an end to preferential treatment of others. *Id.* at n.8. In the context of affirmative action, the Court interprets this to mean an end to *unlawful* preferential treatment of others.

[89]Because plaintiff Carvell has taken advantage of the opportunity to obtain a legal education at SMU, this aspect of the remedy may have little value to him. Carvell, in all probability, will be a practicing member of the bar long before the other plaintiffs, if offered admission to the law school under a constitutional admissions procedure, obtain law

In addition, though the plaintiffs did not prove they suffered any other actual injury, the Court will not ignore the gravity of the noneconomic injury to persons denied equal treatment. Therefore, although normally assessed in the context of procedural due-process violations, the Court believes this to be an appropriate case for the assessment of nominal damages:

> By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. at 266, 98 S. Ct. at 1054. The Court, therefore, will award each plaintiff nominal damages of one dollar.

With regard to general monetary damages, the evidence at trial consisted of each plaintiff's testimony and speculation about the value of a law degree.[90] Because the plaintiffs have failed to establish that they would have been admitted under a constitutional system, they are not entitled to these damages. Further, had the plaintiffs been entitled to damages, none of them established

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degrees.

[90]Elliott testified he thought the median income for recent law school graduates was $57,000 per year. *Elliott*, vol. 7 at 30. Rogers had a somewhat less inflated concept, testifying the average first-year salary for a graduate from the law school was $52,000. Rogers also testified that the defendants had "taken the top off my career" and requested some amount he could not quantify to compensate him for the loss. *Rogers*, vol. 11 at 67.

monetary damages as required under the law and rules of this circuit. *See Haley v. Pan American World Airways,* 746 F.2d 311, 316 (5th Cir. 1984) ("A damage award cannot stand when the only evidence to support it is speculative or purely conjectural."). Finally, the Court would not award Title VI damages even were such damages appropriate because the Court does not believe the defendants intended to discriminate against the plaintiffs in an unlawful manner. *See Carter v. Orleans Parish Pub. Schs.,* 725 F.2d 261, 264 (5th Cir. 1984) (recovery of damages under Title VI precluded unless action intentional or manifested discriminatory animus); *Marvin H. v. Austin Indep. Sch. Dist.,* 714 F.2d 1348, 1356-57 (5th Cir. 1983) (same). Indeed, the evidence reflects the contrary. The defendants acted in good faith and made sincere efforts to follow federal guidelines and to redress past discrimination. The record contains no evidence that the defendants intended to discriminate against or to harm the plaintiffs. Under these facts, an award of damages, especially the punitive damages the plaintiffs request, would be inappropriate.

IV. CONCLUSION

It is regrettable that affirmative action programs are still needed in our society. However, until society sufficiently overcomes the effects of its lengthy history of pervasive racism, affirmative action is a necessity. Further, although no one likes employing racial classifications and distinctions, "it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful." *Bakke,* 438 U.S. at 407, 98 S. Ct. at 2808 (Blackmun, J., concurring in part and dissenting in part).

Commitment to affirmative action programs in educational institutions as just and necessary, however, does not imply that the individual rights of nonminorities should fall by the wayside or be ignored. The concern for individual rights requires that programs implementing racial and ethnic preferences be subjected to the most searching judicial examination of strict scrutiny. Only by applying

strict scrutiny can the judicial branch assure society that the important individual rights protected by the Fourteenth Amendment have not been unnecessarily and unfairly burdened solely as a function of the color of an individual's skin. The judicial branch must carefully and honestly assess the harm to those individual rights in light of the compelling interests served and benefit bestowed upon society by the affirmative action program. To do otherwise would do little more than, in the words of Justice Kennedy, move us from "separate but equal" to "unequal but benign." *Metro Broadcasting*, ___ U.S. at ___, 110 S. Ct. at 3047 (Kennedy, J., dissenting).

Further, if we wish to progress to a society in which affirmative action is no longer necessary, we must be cognizant of pitfalls and dangers created by affirmative action in the form of the stigma some associate with racial preferences and the potential institutionalization of a process that was designed to overcome institutionalized discrimination. The interests of all require that the government not diminish the importance of individual rights, whether belonging to a minority citizen or a nonminority citizen, through programs, that although well-intentioned, unwittingly "permit the seeds of race hate to be planted under sanction of law." *Plessy v. Ferguson*, 163 U.S. 537, 560, 16 S. Ct. 1138, 1147 (1896) (Harlan, J., dissenting).

The Court realizes that some individuals will continue to complain that any admissions program employing preferences based on race, no matter how carefully designed and administered to provide individualized consideration, deprives nonminorities of their rights. However, when the program functions to overcome the effects of years of discrimination and to serve important societal goals, affirmative action "is consistent with equal protection principles as long as it does not impose *undue* burdens on nonminorities." *Metro Broadcasting*, ___ U.S. at ___, 110 S. Ct. at 3026. The Court believes the only way of assuring an *undue* burden is not placed on innocent parties in an admissions procedure

is to treat *all* applicants as individuals and to consider *all* qualifications in selecting the best qualified candidates to comprise an entering class. Using the color of an applicant's skin to limit the degree of individual comparison between the races neither serves societal goals nor sufficiently protects individual rights under our Constitution.[91]

SIGNED on this the 19th day of August 1994.

/s/ Sam Sparks
UNITED STATES DISTRICT JUDGE

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[91]"The hand that rounded Peter's dome,/ And groined the aisles of Christian Rome,/ Wrought in a sad sincerity./ He builded better than he knew!"

Those who devised the Fourteenth Amendment wrought in grave sincerity. They may have builded better than they knew.

They vitalized and energized a principle, as old and as everlasting as human rights. To some of them, the sunset of life may have given mystical lore.

They builded, not for a day, but for all time; not for a few, or for a race; but for man. They planted in the Constitution a monumental truth . . . the golden rule.

Roscoe Conkling, Oral Argument in *County of San Mateo v. Southern Pacific R.R.*, 116 U.S. 138, 6 S. Ct. 317 (1885), in *Oral Argument on Behalf of Defendant by Roscoe Conkling* 34 (1883).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50569

CHERYL J. HOPWOOD, et al.,
Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY
and
BLACK PRE-LAW ASSOCIATION,
Movants-Appellants.

****

DOUGLAS CARVELL, ET AL.,
Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, ET AL.,
Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY,
AND BLACK PRE-LAW ASSOCIATION,
Movants-Appellants.

No. 94-50664

CHERYL J. Hopwood, et al.,
Plaintiffs,

CHERYL J. HOPWOOD, et al.,
Plaintiffs-Appellants,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees.

****

DOUGLAS CARVELL, ET AL.,
Plaintiffs,

DOUGLAS CARVELL,
Plaintiff-Appellant,

VERSUS

STATE OF TEXAS, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

March 18, 1996

Before SMITH, WIENER and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

With the best of intentions, in order to increase the enrollment of certain favored classes of minority students, the University of Texas School of Law ("the law school") discriminates in favor of those applicants by giving substantial racial preferences in its admissions program. The beneficiaries of this system are blacks and Mexican Americans, to the detriment of whites and non-preferred minorities. The question we decide today in No. 94-50664 is whether the Fourteenth Amendment permits the school to discriminate in this way.

We hold that it does not. The law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body. "Racial preferences appear to 'even the score' . . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring in the judgment).

As a result of its diligent efforts in this case, the district court concluded that the law school may continue to impose racial preferences. *See Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994). In No. 94-50664, we reverse and remand, concluding that the law school may not use race as a factor in law school admissions. Further, we instruct the court to reconsider the issue of damages in accordance with the legal standards we now explain. In No. 94- 50569, regarding the denial of intervention by two black student groups, we dismiss the appeal for want of jurisdiction.

I.

A.

The University of Texas School of Law is one of the nation's leading law schools, consistently ranking in the top twenty. *See, e.g., America's Best Graduate Schools*, U.S. News & World Report Mar. 20, 1995, at 84 (national survey ranking of seventeenth). Accordingly, admission to the law school is fiercely competitive, with over 4,000 applicants a year competing to be among the approximately 900 offered admission to achieve an entering class of about 500 students. Many of these applicants have some of the highest grades and test scores in the country.

Numbers are therefore paramount for admission. In the early 1990's, the law school largely based its initial admissions decisions upon an applicant's so- called Texas Index ("TI") number, a composite of undergraduate grade point average ("GPA") and Law School Aptitude Test ("LSAT") score.[1] The law school used this number as a matter of administrative convenience in order to rank candidates and to predict, roughly, one's probability of success in law school. Moreover, the law school relied heavily upon such numbers to estimate the number of offers of admission it needed to make in order to fill its first- year class.

Of course, the law school did not rely upon numbers alone. The admissions office necessarily exercised judgment in interpreting the individual scores of applicants, taking into consideration factors such as the strength of a student's undergraduate education, the difficulty of his major, and significant trends in his own grades and the undergraduate grades at his respective college (such as grade inflation). Admissions personnel also considered what qualities each applicant might bring to his law school class. Thus, the law school could consider an applicant's background, life experiences, and outlook. Not surprisingly, these hard-to-quantify factors were especially significant for marginal candidates.[2]

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[1]The formulae were written by the Law School Data Assembly Service according to a prediction derived from the success of first-year students in preceding years. As the LSAT was determined to be a better predictor of success in law school, the formulae for the class entering in 1992 accorded an approximate 60% weight to LSAT scores and 40% to GPA. The formula for students with a three-digit LSAT, *see infra* note 5, was calculated as: LSAT + (10) (GPA) = TI. For students with a two-digit LSAT, the formula was: (1.25) LSAT + (10) GPA = TI.

[2]Notably, but of less significance to this appeal, residency also had a strong, if not often determinant, effect. Under Texas law in 1992, the law school was limited to a class of 15% non-residents, and the Board of

Because of the large number of applicants and potential admissions factors, the TI's administrative usefulness was its ability to sort candidates. For the class entering in 1992--the admissions group at issue in this case--the law school placed the typical applicant in one of three categories according to his TI scores: "presumptive admit," "presumptive deny," or a middle "discretionary zone." An applicant's TI category determined how extensive a review his application would receive.

Most, but not all, applicants in the presumptive admit category received offers of admission with little review. Professor Stanley Johanson, the Chairman of the Admissions Committee, or Dean Laquita Hamilton, the Assistant Dean for Admissions, reviewed these files and downgraded only five to ten percent to the discretionary zone because of weaknesses in their applications, generally a noncompetitive major or a weak undergraduate education.

Applicants in the presumptive denial category also received little consideration. Similarly, these files would be reviewed by one or two professors, who could upgrade them if they believed that the TI score did not adequately reflect potential to compete at the law school. Otherwise, the applicant was rejected.

Applications in the middle range were subjected to the most extensive scrutiny. For all applicants other than blacks and Mexican Americans, the files were bundled into stacks of thirty, which were given to admissions subcommittees consisting of three members of the full admissions committee. Each subcommittee member, in reviewing the thirty files, could cast a number of votes--

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Regents required an entering class of at least 500 students. The law school therefore had to monitor offers to non-residents carefully, in order not to exceed this quota, while at the same time maintaining an entering class of a manageable size.

typically from nine to eleven[3]--among the thirty files. Subject to the chairman's veto, if a candidate received two or three votes, he received an offer; if he garnered one vote, he was put on the waiting list; those with no votes were denied admission.

Blacks and Mexican Americans were treated differently from other candidates, however. First, compared to whites and non-preferred minorities,[4] the TI ranges that were used to place them into the three admissions categories were lowered to allow the law school to consider and admit more of them. In March 1992, for example, the presumptive TI admission score for resident whites and non-preferred minorities was 199.[5] Mexican Americans and

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[3]The number of votes would change over the course of the admissions season in order to achieve the appropriate number of offers.

[4]As blacks and Mexican Americans were the only two minority categories granted preferential treatment in admissions, it is inaccurate to say that the law school conducted separate admissions programs for "minorities" and "non-minorities." While the law school application form segregated racial and ethnic classification into seven categories– "Black/African American," "Native American," "Asian American," "Mexican American," "Other Hispanic" (meaning non-Mexican descent), "White," and "Other (describe)"–only American blacks and Mexican Americans received the benefit of the separate admissions track. Thus, for example, the law school decided that a black citizen of Nigeria would not get preferential treatment, but a resident alien from Mexico, who resided in Texas, would. Likewise, Asians, American Indians, Americans from El Salvador and Cuba, and many others did not receive a preference. It is important to keep the composition of these categories in mind. For the sake of simplicity and readability, however, we sometimes will refer to two broad categories: "whites" (meaning Texas residents who were whites and non-preferred minorities) and "minorities" (meaning Mexican Americans and black Americans).

[5]Because of a recent change in the grading scale of the LSAT, the law school in 1992 had applicants who had taken an earlier LSAT scored on

blacks needed a TI of only 189 to be presumptively admitted.[6] The difference in the presumptive-deny ranges is even more striking. The presumptive denial score for "nonminorities" was 192; the same score for blacks and Mexican Americans was 179.

While these cold numbers may speak little to those unfamiliar with the pool of applicants, the results demonstrate that the difference in the two ranges was dramatic. According to the law school, 1992 resident white applicants had a *mean* GPA of 3.53 and an LSAT of 164. Mexican Americans scored 3.27 and 158; blacks scored 3.25 and 157. The category of "other minority" achieved a 3.56 and 160.[7]

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a 10-to-48 scale and others who had taken a later one scored on a 120-to-180 scale. Equivalence calculations were used to compare scores received on the two scales. For example, TI numbers of 199 (three-digit LSAT) and 87 (two-digit LSAT) were equivalent. For the sake of simplicity, we use three-digit numbers throughout this opinion.

[6]In March 1992, the resident Mexican American and black presumptive admit lines were in parity, but they had not started that way. The initial presumptive admit TI's were 196 for Mexican Americans and 192 for blacks. Thus, initially, blacks received preferential treatment over Mexican Americans by having a lower hurdle to cross to get into the discretionary zone. In March, Professor Johanson lowered the Mexican American TI in order to admit more of this group.

[7]The *median* scores of the 1992 class are as follows:

Ethnicity	Resident GPA/LSAT	Nonresident GPA/LSAT
All students	3.52/162	3.61/164
White	3.56/164	3.72/166
Black	3.30/158	3.30/156
Mexican American	3.24/157	3.38/174*
Other minority	3.58/160	3.77/157

These disparate standards greatly affected a candidate's chance of admission. For example, by March 1992, because the presumptive *denial* score for whites was a TI of 192 or lower, and the presumptive *admit* TI for minorities was 189 or higher, a minority candidate with a TI of 189 or above almost certainly would be *admitted,* even though his score was considerably below[8]

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*Only two matriculated applicants.

In 1992, the LSAT's national distribution was approximately as follows:

LSAT	Percentile	2-Digit LSAT
166	94%	43
164	91%	41
162	88%	40
160	83%	39
158	78%	38
156	71%	36

On the basis of these percentiles, one-half of the law school's white resident matriculants were in the top 9% of all test-takers, one-half of the resident Mexican Americans were in approximately the top 25% of test-takers, and one-half of the resident blacks were in the top 22% of test-takers.

[8]To illustrate this difference, we consider the four plaintiffs in this case–Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers. For a student similarly situated to Hopwood, with a GPA of 3.8, to avoid presumptive denial as a white, i.e., to obtain a TI of 193 or above, her LSAT had to be at least a 155, a score in approximately the top 32% of test-takers. If she were black (thus, needing a 180 TI), she would have had to score a 142 on the LSAT, ranking her only in the top 80%. Likewise, a student similar to Carvell, who had a 3.28 GPA, would have needed a "white" LSAT of 160 (top 17%) and a "black" 147 (top 63%). A student like Rodgers with a 3.13 would have needed either a 162 (top 12%) as a white or 149 as a black (top 56%). Finally, a student

the level at which a white candidate almost certainly would be *rejected.* Out of the pool of resident applicants who fell within this range (189-192 inclusive), 100% of blacks and 90% of Mexican Americans, but only 6% of whites, were offered admission.[9]

The stated purpose of this lowering of standards was to meet an "aspiration" of admitting a class consisting of 10% Mexican Americans and 5% blacks, proportions roughly comparable to the percentages of those races graduating from Texas colleges. The law school found meeting these "goals" difficult, however, because of uncertain acceptance rates and the variable quality of the applicant pool.[10] In 1992, for example, the entering class contained 41 blacks and 55 Mexican Americans, respectively 8% and 10.7% of the class.

In addition to maintaining separate presumptive TI levels for minorities and whites, the law school ran a segregated application evaluation process. Upon receiving an application form, the school color-coded it according to race. If a candidate failed to designate his race, he was presumed to be in a nonpreferential category. Thus, race was always an overt part of the review of any applicant's file.

The law school reviewed minority candidates within the applicable discretionary range differently from whites. Instead of

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like Elliott with a 2.98 GPA would have needed a 163 (top 10%) or 150 (top 53%), respectively.

[9]According to the plaintiffs, 600-700 higher-scoring white residents were passed over before the first blacks were denied admission. There is no specific finding on this assertion, and though the law school does not appear to refute it, we do not rely upon it in making our decision.

[10]Thus, the law school constantly had to adjust its TI range over the course of the admissions season to reach a desired mix. *See supra* note 6.

being evaluated and compared by one of the various discretionary zone subcommittees, black and Mexican American applicants' files were reviewed by a minority subcommittee of three, which would meet and discuss every minority candidate. Thus, each of these candidates' files could get extensive review and discussion. And while the minority subcommittee reported summaries of files to the admissions committee as a whole, the minority subcommittee's decisions were "virtually final."

Finally, the law school maintained segregated waiting lists, dividing applicants by race and residence. Thus, even many of those minority applicants who were not admitted could be set aside in "minority-only" waiting lists. Such separate lists apparently helped the law school maintain a pool of potentially acceptable, but marginal, minority candidates.[11]

B.

Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers (the "plaintiffs") applied for admission to the 1992 entering law school class. All four were white residents of Texas and were rejected.

The plaintiffs were considered as discretionary zone candidates.[12] Hopwood, with a GPA of 3.8 and an LSAT of 39 (equivalent to a three-digit LSAT of 160), had a TI of 199, a score

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[11]The district court did not find, nor is the record clear on, how these different classes of waiting list candidates were compared in the event the law school made last-minute admissions decisions. The record does show that the school carefully monitored the race of applicants in filling the last openings in late spring and early summer.

[12]The district court discussed in detail the plaintiffs' qualifications and their rejections. *See* 861 F. Supp. at 564-67.

barely within the presumptive-admit category for resident whites, which was 199 and up. She was dropped into the discretionary zone for resident whites (193 to 198), however, because Johanson decided her educational background overstated the strength of her GPA. Carvell, Elliott, and Rogers had TI's of 197, at the top end of that discretionary zone. Their applications were reviewed by admissions subcommittees, and each received one or no vote.

II.

The plaintiffs sued primarily under the Equal Protection Clause of the Fourteenth Amendment; they also claimed derivative statutory violations of 42 U.S.C. §§ 1981 and 1983 and of title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("title VI").[13] The plaintiffs' central claim is that they were subjected to unconstitutional racial discrimination by the law school's evaluation of their admissions applications. They sought injunctive and declaratory relief and compensatory and punitive damages.

After a bench trial, the district court held that the school had violated the plaintiffs' equal protection rights. 861 F. Supp. at 579. The plaintiffs' victory was pyrrhic at best, however, as the court refused to enjoin the law school from using race in admissions decisions or to grant damages beyond a one-dollar nominal award to each plaintiff. The district court, however, did grant declaratory relief and ordered that the plaintiffs be allowed to apply again without paying the requisite fee. *Id.* at 583.

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[13]The defendants are the State of Texas; the University of Texas Board of Regents; the members of the board, named but sued in their official capacities; the University of Texas at Austin; the President of the university, sued in his official capacity; the University of Texas School of Law; the dean of the law school, sued in his official capacity; and the Chairman of the Admissions Committee, sued in his official capacity.

The district court began by recognizing the proper constitutional standard under which to evaluate the admissions program: strict scrutiny. *Id.* at 568. As it was undisputed that the school had treated applicants disparately based upon the color of their skin, the court asked whether the law school process (1) served a compelling government interest and (2) was narrowly tailored to the achievement of that goal. Under the first prong of the test, the court held that two of the law school's five proffered reasons met constitutional muster: (1) "obtaining the educational benefits that flow from a racially and ethnically diverse student body" and (2) "the objective of overcoming past effects of discrimination." *Id.* at 571.

Significantly, on the second justification, the court rejected the plaintiffs' argument that the analysis of past discrimination should be limited to that of the law school; instead, the court held that the State of Texas's "institutions of higher education are inextricably linked to the primary and secondary schools in the system." *Id.*[14]

Accordingly, the court found that Texas's long history of racially discriminatory practices in its primary and secondary schools in its not-too-distant past had the following present effects at UT law: "the law school's lingering reputation in the minority community, particularly with prospective students, as a 'white' school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities." *Id.* at 572. The court also noted that "were the Court to limit its review to the University of Texas, the Court would still find a 'strong evidentiary basis for concluding that remedial action is necessary.' " *Id.* (citation omitted).

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[14]Because of this conclusion, the district court examined at length the history of race relations in Texas and discrimination in its schools. 861 F. Supp. at 554-57.

The court next evaluated whether the Texas program was narrowly tailored to further these goals. *Id.* at 573. Applying a four-factor test devised by the Supreme Court, the court held only part of the 1992 admissions scheme unconstitutional. Those parts that gave minorities a "plus," that is, the component of the admissions program that treated candidates' TI scores differently based upon race, was upheld. *Id.* at 578.

The court held, however, that differential treatment was not allowed where candidates of different races were not compared at some point in the admission process. Thus, the court struck down the school's use of separate admissions committees for applications in the discretionary zone, *id.* at 578-79, and in *dictum* speculated that presumptive denial lines would not pass muster, as many white candidates would get no review, while similarly situated minorities would, *id.* at 576 n. 71.

Though it declared that the law school's 1992 admissions program violated the plaintiffs' equal protection rights, the court granted little relief. First, the court did not order that the plaintiffs be admitted to the law school. Instead, it used what it saw as analogous title VII caselaw on burden-shifting to hold that while the state had committed a constitutional violation, the plaintiffs had the ultimate burden of proving damages. *Id.* at 579-80. The court then found that the defendants had proffered a legitimate, non-discriminatory reason for denying the plaintiffs admission and that the plaintiffs had not met their burden of showing that they would have been admitted but for the unlawful system. *Id.* at 582.

Moreover, the court held that the plaintiffs were not entitled to prospective injunctive relief, because "of the law school's voluntary change to a procedure, which on paper and from the testimony, appears to remedy the defects the Court has found in the 1992

procedure." *Id.*[15] To pass muster under the court's reasoning, the law school simply had to have one committee that at one time during the process reviewed all applications and did not establish separate TI numbers to define the presumptive denial categories. In other words, if the law school applied the same academic standards, but had commingled the minority review in the discretionary zone with the review of whites, its program would not have been struck down. The same admissions result would occur, but the process would be "fair." *Id.*

Finally, the court determined that the only appropriate relief was a declaratory judgment and an order allowing the plaintiffs to reapply to the school without charge. *Id.* at 582-83. No compensatory or punitive damages, the court reasoned, could be awarded where the plaintiffs had proven no harm. Moreover, the court reasoned that as the law school had promised to change its admissions program by abandoning the two-committee system, no prospective injunctive relief was justified.

III.

The central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno,* 113 S. Ct. 2816, 2824 (1993) (citing *Washington v. Davis,* 426 U.S. 229, 239 (1976)). It seeks ultimately to render the issue of race irrelevant in governmental decisionmaking. *See Palmore v. Sidoti,* 466 U.S. 429, 432, (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination.") (footnote omitted).

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[15]Shortly before trial, apparently in response to the filing of this lawsuit, the law school modified its 1992 admissions practices to fit the district court's view of the proper constitutional system. *See id.* at 582 n. 87.

Accordingly, discrimination based upon race is highly suspect. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and "racial discriminations are in most circumstances irrelevant and therefore prohibited . . . ." *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). Hence, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 307 (1978) (opinion of Powell, J.); *see also Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Brown v. Board of Educ.,* 347 U.S. 483, 493-94 (1954). These equal protection maxims apply to all races. *Adarand Constructors v. Pena,* 115 S. Ct. 2097, 2111 (1995).

In order to preserve these principles, the Supreme Court recently has required that any governmental action that expressly distinguishes between persons on the basis of race be held to the most exacting scrutiny. *See, e.g., id.* at 2113; *Loving,* 388 U.S. at 11. Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny[16] when evaluating all racial classifications, including those characterized by their proponents as "benign" or "remedial."[17]

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[16]In their initial brief on appeal, the defendants argued that intermediate scrutiny is appropriate here. In a supplemental brief filed to address the subsequent opinion in *Adarand,* they now acknowledge that strict scrutiny is the appropriate test.

[17]*Adarand,* 115 S. Ct. at 2112-13 (overruling *Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547 (1990), insofar as it applied intermediate scrutiny to congressionally mandated "benign" racial classifications); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 495 (1989) (plurality opinion) ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification"); *id.* at 520 (Scalia, J., concurring in judgment); *Wygant*

Strict scrutiny is necessary because the mere labeling of a classification by the government as "benign" or "remedial" is meaningless. As Justice O'Connor indicated in *Croson:*

> Absent searching judicial inquiry into the justifications for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493 (plurality opinion).

Under the strict scrutiny analysis, we ask two questions: (1) Does the racial classification serve a compelling government interest, and (2) is it narrowly tailored to the achievement of that goal? *Adarand,* 115 S. Ct. at 2111, 2117. As the *Adarand* Court emphasized, strict scrutiny ensures that "courts will consistently give racial classifications . . . detailed examination both as to ends and as to means." *Id.*[18]

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v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (plurality opinion) ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to government discrimination.").

[18]While *Adarand*–the Supreme Court's most recent opinion on racial preferences–does not directly address the application of the strict scrutiny test, it underscores the presumptive unconstitutionality of racial classifications. "By requiring strict scrutiny of racial classifications, we

Finally, when evaluating the proffered governmental interest for the specific racial classification, to decide whether the program in question narrowly achieves that interest, we must recognize that "the rights created by . . . the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).[19] Thus, the Court consistently has rejected arguments conferring benefits on a person based solely upon his membership in a specific class of persons.[20]

With these general principles of equal protection in mind, we turn to the specific issue of whether the law school's consideration of race as a factor in admissions violates the Equal Protection Clause. The district court found both a compelling remedial and a non-remedial justification for the practice.

First, the court approved of the non-remedial goal of having a diverse student body, reasoning that "obtaining the educational benefits that flow from a racially and ethnically diverse student

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require courts to make sure that a government classification based on race, which 'so seldom provide[s] a relevant basis for disparate treatment,' *Fullilove* [*v. Klutznick*, 448 U.S. 448, 534 (1980)], (Stevens, J., dissenting), is legitimate, before permitting unequal treatment based on race." 115 S. Ct. at 2113.

[19]*See also Adarand, id.* at 2111 ("[A]ny person, of whatever race, has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

[20]*See, e.g., Croson*, 488 U.S. at 498-500 (holding that past societal discrimination against a group confers no basis for local governments to provide a specifically tailored remedy to current members of that group); *Wygant*, 476 U.S. at 275-76 (rejecting argument that governmental discrimination in teacher layoffs is allowed to foster role models within a group).

body remains a sufficiently compelling interest to support the use of racial classifications." 861 F. Supp. at 571. Second, the court determined that the use of racial classifications could be justified as a remedy for the "present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole." *Id.* at 573.

A.

1.

Justice Powell's separate opinion in *Bakke* provided the original impetus for recognizing diversity as a compelling state interest in higher education. In that case, Allan Bakke, a white male, was denied admission to the Medical School of the University of California at Davis, a state-run institution. Claiming that the State had discriminated against him impermissibly because it operated two separate admissions programs for the medical school, he brought suit under the state constitution, title VI, and the Equal Protection Clause.

Under the medical school's admissions system, the white applicants, who comprised the majority of the prospective students, applied through the general admissions program. A special admissions program was reserved for members of "minority groups" or groups designated as "economically and/or educationally disadvantaged." The university set aside sixteen of the one hundred positions in the entering class for candidates from the special program.

The California Supreme Court struck down the program on equal protection grounds, enjoined any consideration of race in the admissions process, and ordered that Bakke be admitted. The United States Supreme Court affirmed in part and reversed in part in an opinion announced by Justice Powell. 438 U.S. at 271-72 (opinion of Powell, J.). The Court reached no consensus on a justification for its result, however. Six Justices filed opinions,

none of which garnered more than four votes (including the writer's). The two major opinions–one four-Justice opinion by Justices Brennan, White, Marshall, and Blackmun and one by Justice Stevens in which Chief Justice Burger and Justices Stewart and Rehnquist joined–reflected completely contrary views of the law.

While Justice Powell found the program unconstitutional under the Equal Protection Clause and affirmed Bakke's admission, Justice Stevens declined to reach the constitutional issue and upheld Bakke's admission under title VI. Justice Powell also concluded that the California Supreme Court's proscription of the consideration of race in admissions could not be sustained. This became the judgment of the Court, as the four-Justice opinion by Justice Brennan opined that racial classifications designed to serve remedial purposes should receive only intermediate scrutiny. These Justices would have upheld the admissions program under this intermediate scrutiny, as it served the substantial and benign purpose of remedying past societal discrimination.

Hence, Justice Powell's opinion has appeared to represent the "swing vote," and though, in significant part, *see id.* at 272 n.*, it was joined by no other Justice, it has played a prominent role in subsequent debates concerning the impact of *Bakke*.[21] In the present case, the significance of Justice Powell's opinion is its discussion of compelling state interests under the Equal Protection

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[21]*See, e.g.*, Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 24 (1979) (arguing that *Bakke*'s precedential force is governed by the common conclusions of Justices Powell and Stevens, though it is erroneous to conclude that Powell's opinion has "controlling significance on all questions"); Robert G. Dixon, Jr., *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69 (1979) (Justice Powell's "tiebreaking opinion . . . has acquired wide pragmatic appeal.").

Clause. *See id.* at 305-15. Specifically, after Justice Powell recognized that the proper level of review for racial classifications is strict scrutiny, *id.* at 305-06, he rejected and accepted respective justifications for the school's program as "substantial enough to support the use of a suspect classification," *id.* at 306. Notably, because the first step in reviewing an affirmative action program is a determination of the state's interests at stake,[22] it often is the determinative step. Justice Powell outlined the four state interests proffered by the *Bakke* defendants:

> The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,"; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) *obtaining the educational benefits that flow from an ethnically diverse student body.*

Id. at 305-06 (emphasis added, citation and footnote omitted).

Justice Powell reasoned that the second and third justifications--remedying societal discrimination and providing role models--were never appropriate.[23] He determined that any remedial justification was limited to eliminating "identified discrimination" with

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[22]As affirmative action programs are by definition purposeful classifications by race, they do not present the problem of governmental action that is facially neutral but has a disparate impact and is motivated by race. *See City of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

[23]The Supreme Court subsequently has agreed with that position. *See Wygant*, 476 U.S. at 274-76 (plurality opinion). The district court *a quo* erred in suggesting that societal discrimination is constitutionally cognizable. *See* 861 F. Supp. at 570 n.56, 571 n.60.

"disabling effects." *Id.* at 307 (citing the school desegregation cases). He specifically emphasized that a particularized finding of a constitutional or statutory violation must be present before a remedy is justified. He determined not only that such findings were not present in *Bakke*, but that the medical school was not even in a position to make such findings. *Id.* at 309.

Justice Powell further reasoned that diversity is a sufficient ustification for limited racial classification. *Id.* at 311-16. "[The attainment of a diverse student body] clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 311. He argued that diversity of minorities' viewpoints furthered "academic freedom," an interest under the Constitution. While acknowledging that "academic freedom" does not appear as a constitutional right, he argued that it had "long . . . been viewed as a special concern of the First Amendment." *Id.* at 312.[24]

Justice Powell presented this "special concern" as in tension with the Fourteenth Amendment. "Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment." *Id.* at 313.[25] The Justice then concluded that

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[24]*See also Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (recognizing four separate components of "academic freedom").

[25]Saying that a university has a First Amendment interest in this context is somewhat troubling. Both the medical school in *Bakke* and, in our case, the law school are state institutions. The First Amendment generally protects citizens from the actions of government, not government from its citizens. Significantly, *Sweezy* involved a person who was called before the Attorney General of New Hampshire to answer for alleged subversive activities. He declined on First Amendment grounds to answer questions about a lecture he had delivered

> [a]n otherwise qualified medical student with a particular background–whether it be ethnic, geographic, culturally advantaged or disadvantaged–may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Id. at 314 (footnote omitted). Justice Powell therefore approved of a consideration of ethnicity as "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.*

The next step for Justice Powell was to decide whether the medical school's program was necessary to further the goal of diversity. He said it was not. As the program made race the only determining factor for a certain number of the open spots that had been set aside, it did not further full diversity but only a conception of that term limited to race.

Justice Powell speculated that a program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet does not insulate the individual from comparison with all the other candidates for the available seats," might pass muster. *Id.* at 317. The Justice did not define what he meant by a "plus," but he did write that a "plus" program would be one in whi an

> applicant who loses out to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong

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at the University of New Hampshire. While Justice Frankfurter spoke of a university's interest in openness and free inquiry, it was plainly through the First Amendment rights of individual scholars. 354 U.S. at 262, 266-67 (Frankfurter, J., concurring in result).

> surname. It would only mean that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of another applicant. His qualifications would have been weighted fairly and competitively, and he would have no basis to complaint of unequal treatment under the Fourteenth Amendment.

Id. at 318.

Under this conception of the Fourteenth Amendment, a program that considered a host of factors that include race would be constitutional, even if an applicant's race "tipped the scales" among qualified applicants. What a school could not do is to refuse to compare applicants of different races or establish a strict quota on the basis of race. In sum, Justice Powell found the school's program to be an unconstitutional "quota" system, but he intimated that the Constitution would allow schools to continue to use race in a wide-ranging manner.

2.

Here, the plaintiffs argue that diversity is not a compelling governmental interest under superseding Supreme Court precedent. Instead, they believe that the Court finally has recognized that only the *remedial* use of race is compelling. In the alternative, the plaintiffs assert that the district court misapplied Justice Powell's *Bakke* standard, as the law school program here uses race as a strong determinant rather than a mere "plus" factor and, in any case, the preference is not narrowly applied. The law school maintains, on the other hand, that Justice Powell's formulation in *Bakke* is law and must be followed–at least in the context of higher education.

We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his

own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.

Justice Powell's view in *Bakke* is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In *Bakke,* the word "diversity" is mentioned nowhere except in Justice Powell's single-Justice opinion. In fact, the four-Justice opinion, which would have upheld the special admissions program under intermediate scrutiny, implicitly rejected Justice Powell's position. *See* 438 U.S. at 326 n.1 (Brennan, White, Marshall, and Blackmun JJ., concurring in the judgment in part and dissenting) ("We also agree with Mr. Justice POWELL that a plan like the "Harvard" plan . . . is constitutional under our approach, *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.*") (emphasis added). Justice Stevens declined to discuss the constitutional issue. *See id.* at 412 (Stevens, J., concurring in the judgment in part and dissenting in part).

Thus, only one Justice concluded that race could be used solely for the reason of obtaining a heterogenous student body. As the *Adarand* Court states, the *Bakke* Court did not express a majority view and is questionable as binding precedent. 115 S. Ct. at 2109 ("The Court's failure in *Bakke* . . . left unresolved the proper analysis for remedial race-based government action.").

Since *Bakke,* the Court has accepted the diversity rationale only once in its cases dealing with race. Significantly, however, in that case, *Metro Broadcasting, Inc. v. Federal Communications Comm'n,* 497 U.S. 547, 564-65 (1990), the five-Justice majority

relied upon an intermediate scrutiny standard of review to uphold the federal program seeking diversity in the ownership of broadcasting facilities. In *Adarand,* 115 S. Ct. at 2112-13, the Court squarely rejected intermediate scrutiny as the standard of review for racial classifications, and *Metro Broadcasting* is now specifically overruled to the extent that it was in conflict with this holding. *Id.* at 2113. No case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis.

Indeed, recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny. Foremost, the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs. In *Croson,* 488 U.S. at 493 (plurality opinion), the Court flatly stated that "[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." (emphasis added).[26]

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[26]*See also Milwaukee County Pavers Ass'n v. Fiedler,* 922 F.2d 419, 422 (7th Cir.) ("The whole point of *Croson* is that disadvantage, *diversity,* or other grounds favoring minorities will not justify governmental racial discrimination . . . ; only a purpose of remedying discrimination against minorities will do so.") (emphasis added), *cert. denied,* 500 U.S. 954 (1991). Notably, Justice Scalia rejected the use of racial classifications "in order (in a broad sense) 'to ameliorate the effects of past discrimination.' " *Croson,* 488 U.S. at 520 (Scalia, J., concurring in the judgment) (quoting *Croson,* 488 U.S. at 476-77). He, however, suggested one other possible compelling state interest: a social emergency. He opined that "where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb" will justify racial classifications. *Croson,* 488 U.S. at 521 (Scalia, J., concurring in judgment). While such an interest is probably consistent with the widely criticized holdings of *Hirabayashi v. United States,* 320 U.S. 81 (1943), and *Korematsu v. United States,* 323 U.S. 214 (1944),

Justice O'Connor, in her *Adarand*-vindicated dissent in *Metro Broadcasting*, joined by Justices Rehnquist, Scalia, and Kennedy, explained this position:

> Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.

497 U.S. at 612 (O'Connor, J., dissenting). Indeed, the majority in *Metro Broadcasting* had not claimed otherwise and decided only that such an interest was "important." Justice Thomas, who joined the Court after *Metro Broadcasting* was decided, roundly condemned "benign" discrimination in his recent *Adarand* opinion, in which he suggests that the diversity rationale is inadequate to meet strict scrutiny. *See Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in judgment).[27]

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plainly such an interest is not presented in this case.

[27]The law school places much reliance upon Justice O'Connor's concurrence in *Wygant* for the proposition that Justice Powell's *Bakke* formulation is still viable. In her 1986 *Wygant* opinion, in the context of discussing Justice Powell's opinion, Justice O'Connor noted that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment). The law school's argument is not persuasive. Justice O'Connor's statement is purely descriptive and did not purport to express her approval or disapproval of diversity as a compelling interest. Her subsequent statements outlined above in *Croson* and *Metro Broadcasting* suggest strongly that reliance

In short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not.

Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants. Thus, the Supreme Court has long held that governmental actors cannot justify their decisions solely because of race. *See, e.g., Croson*, 488 U.S. at 496 (plurality opinion); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

Accordingly, we see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge.

While the use of race *per se* is proscribed, state-supported schools may reasonably consider a host of factors--some of which may have some correlation with race--in making admissions decisions. The federal courts have no warrant to intrude on those executive and legislative judgments unless the distinctions intrude on specific provisions of federal law or the Constitution. A

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upon this statement in *Wygant* is unjustified.

university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background.[28]

For this reason, race often is said to be justified in the diversity context, not on its own terms, but as a proxy for other characteristics that institutions of higher education value but that do not raise similar constitutional concerns.[29] Unfortunately, this approach simply replicates the very harm that the Fourteenth Amendment was designed to eliminate.

The assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group. This assumption, however, does not withstand scrutiny. "[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities,*

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[28]The law school's admissions program makes no distinction among black and Mexican American applicants in an effort to determine which of them, for example, may have been culturally or educationally disadvantaged.

[29]For example, Justice Powell apparently felt that persons with different ethnic backgrounds would bring diverse "experiences, outlooks, and ideas" to the medical school. *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

1974 Sup. Ct. Rev. 12 (1974).

To believe that a person's race controls his point of view is to stereotype him. The Supreme Court, however, "has remarked a number of times, in slightly different contexts, that it is incorrect and legally inappropriate to impute to women and minorities 'a different attitude about such issues as the federal budget, school prayer, voting, and foreign relations.'" Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion,* 71 Tex. L. Rev. 993, 1000 (1993) (quoting *Roberts v. United States Jaycees,* 468 U.S. 609, 627-28 (1984)). "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting,* 497 U.S. at 602 (O'Connor, J., dissenting).[30]

Instead, individuals, with their own conceptions of life, further diversity of viewpoint. Plaintiff Hopwood is a fair example of an applicant with a unique background. She is the now-thirty-two-year-old wife of a member of the Armed Forces stationed in San Antonio and, more significantly, is raising a severely handicapped child. Her circumstance would bring a different perspective to the law school. The school might consider this an advantage to her in

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[30]Thus, to put it simply, under the Equal Protection Clause

> the distribution of benefits and costs by government on racial or ethnic grounds is impermissible. Even though it is frequently efficient to sort people by race or ethnic origin, because racial or ethnic identity may be a good proxy for functional classifications, efficiency is rejected as a basis for governmental action in this context.

Posner, *supra,* at 22.

the application process, or it could decide that her family situation would be too much of a burden on her academic performance.

We do not opine on which way the law school should weigh Hopwood's qualifications; we only observe that "diversity" can take many forms. To foster such diversity, state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race.[31]

The Court also has recognized that government's use of racial classifications serves to stigmatize. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (observing that classification on the basis of race "generates a feeling of inferiority"). While one might argue that the stigmatization resulting from so-called "benign" racial classifications is not as harmful as that arising from

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[31] We recognize that the use of some factors such as economic or educational background of one's parents may be somewhat correlated with race. This correlation, however, will not render the use of the factor unconstitutional if it is not adopted for the purpose of discriminating on the basis of race. *See McCleskey v. Kemp*, 481 U.S. 279 (1987). As Justice O'Connor indicated in *Hernandez v. New York*, 500 U.S. 352 (1991), which was a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), based upon the prosecution's strike of potential jurors who spoke Spanish:

> No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is.

500 U.S. at 375 (O'Connor, J., joined by Scalia, J., concurring in the judgment).

invidious ones,[32] the current Court has now retreated from the idea that so-called benign and invidious classifications may be distinguished.[33] As the plurality in *Croson* warned, "[c]lassifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility." 488 U.S. at 493.[34]

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[32]According to one of the four-Justice opinions in *Bakke*, racial classifications stigmatize when "they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separation." 438 U.S. at 357-58 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). In *Bakke*, however, these Justices rejected strict scrutiny because the program at issue could not be said to stigmatize as did other racial classifications. These Justices nevertheless recognized that rational-basis scrutiny would not be enough. *Id.* at 361 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

[33]As Judge Posner has indicated,

> the proper constitutional principle is not, no "invidious" racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens. . . . To ask whether racial exclusion may not have overriding benefits for both races in particular circumstances is to place the antidiscrimination principle at the mercy of the vagaries of empirical conjecture and thereby free the judge to enact his personal values into constitutional doctrine.

Posner, *supra*, at 25-26.

[34]*See also Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in judgment) ("But there can be no doubt that racial paternalism and its unintended consequences may be as poisonous and pernicious as any other form of discrimination."). One prominent constitutional commentator specifically has noted that where programs

Finally, the use of race to achieve diversity undercuts the ultimate goal of the Fourteenth Amendment: the end of racially-motivated state action. Justice Powell's conception of race as a "plus" factor would allow race always to be a potential factor in admissions decisionmaking. While Justice Blackmun recognized the tension inherent in using race-conscious remedies to achieve a race-neutral society, he nevertheless accepted it as necessary. *Bakke*, 438 U.S. at 405. Several Justices who, unlike Justices Powell and Blackmun, are still on the Court, have now renounced toleration of this tension, however. *See Croson*, 488 U.S. at 495, (plurality opinion of O'Connor, J.) ("The dissent's watered down version of equal protection review effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of

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involve lower and separate standards of selection, "a new badge of implied inferiority, assigned as an incident of governmental noblesse oblige," results.

> Explicit in state, local, or federal plans using separate and *lower* standards by race is a statement by government that certain persons identified by race are in fact being placed in positions they may be presumed not likely to hold but for their race (because they are presumed to be unable to meet standards the government itself requires to be met). The message from government is written very large when these plans proliferate: a double (and softer) standard for admission, a double (and softer) standard for hiring, a double (and softer) standard for promotion, a double (and softer) standard for competitive bidding, and so on. Without question, this is a systematic racial tagging by government–a communication to others that the race of the individual they deal with bespeaks a race-related probability, created solely by the government itself, of lesser qualification than others holding equivalent positions.

William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 787 n.38 (1979).

'eliminat[ing] entirely from government decisionmaking such irrelevant factors as a human being's race . . . will never be achieved.") (quoting *Wygant*, 476 U.S. at 320 (Stevens, J., dissenting)).[35]

In sum, the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny.[36] These latter factors may, in fact, turn out to be

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[35] As professor Van Alstyne has argued:

> Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life–or in the life or practices of one's government–the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Van Alstyne, *supra* note 34, at 809-10.

[36] Because we have determined that any consideration of race by the law school is constitutionally impermissible if justified by diversity, it is not necessary to determine whether, as plaintiffs argue, the admissions system under which the plaintiffs applied operated as a *de facto* "quota" system similar to the one struck down in *Bakke*. We do note that even if a "plus" system were permissible, it likely would be impossible to maintain such a system without degeneration into nothing more than a "quota" program. *See Bakke*, 438 U.S. at 378 ("For purposes of constitutional adjudication, there is no difference between [setting aside a certain number of places for minorities and using minority status as a positive factor].") (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Indeed, in this case, the law school appeared to be especially adept at meeting its yearly

substantially correlated with race, but the key is that race itself not be taken into account. Thus, that portion of the district court's opinion upholding the diversity rationale is reversibly flawed.[37]

B.

We now turn to the district court's determination that "the remedial purpose of the law school's affirmative action program is a compelling government objective." 861 F. Supp. at 573. The plaintiffs argue that the court erred by finding that the law school could employ racial criteria to remedy the present effects of past discrimination in Texas's primary and secondary schools. The plaintiffs contend that the proper unit for analysis is the law school, and the state has shown no recognizable present effects of the law school's past discrimination. The law school, in response, notes Texas's well-documented history of discrimination in education and argues that its effects continue today at the law school, both in the level of educational attainment of the average minority applicant and in the school's reputation.

In contrast to its approach to the diversity rationale, a majority of the Supreme Court has held that a state actor may racially classify where it has a "strong basis in the evidence for its conclusion that remedial action was necessary." *Croson,* 488 U.S. at 500 (quoting *Wygant,* 476 U.S. at 277 (plurality opinion)). Generally, "[i]n order to justify an affirmative action program, the

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"goals." *See Hopwood,* 861 F. Supp. at 574 n.67.

[37]Plaintiffs additionally have argued that the law school's program was not narrowly tailored in the diversity context because (1) it failed to award preferences to non-Mexican Hispanic Americans, Asian Americans, American Indians, or other minorities, and (2) it failed to accord as much weight to non-racial diversity factors, such as religion and socioeconomic background, as it did to race.

State must show there are 'present effects of past discrimination.'" *Hopwood v. Texas* ("*Hopwood I*"),[38] 21 F.3d 603, 605 (5th Cir. 1994) (per curiam) (quoting *Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir. 1992), *cert. denied*, 115 S. Ct. 2001 (1995)); *see also Wygant*, 476 U.S. at 280 (opining that "in order to remedy the effects of prior discrimination, it may be necessary to take race into account") (opinion of Powell, J.).[39]

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[38] *Hopwood I* is the first appeal of the intervention issue that we address *infra*.

[39] Unfortunately, the precise scope of allowable state action is of somewhat undefined contours. Indeed, it is not evident whether permitted remedial action extends to the "present effects of past discrimination." This language, derived from Justice Brennan's opinion in *Bakke*, 438 U.S. at 362-66, appears intended to present little resistance to wide-ranging affirmative action plans.

While Justice Brennan began by stating that schools have a duty affirmatively to erase the vestiges of their past discriminatory practices, he compared this duty to the power of Congress to enforce § 1 of the Fourteenth Amendment through § 5. He reasoned that under that wide-ranging power, the beneficiaries of such a program need not present proof that they were discriminated against; a showing that they were in the general class was sufficient. *Id.* at 363-64. Nor would a school need judicial findings of past discrimination. *Id.* at 364. Finally, he argued that such beneficiaries would not even have to show that that school had a history of past discrimination, but need only suggest that they were the victims of general societal discrimination that prevented them from being otherwise qualified to enter the school. *Id.* at 365-66. Hence, under this standard, almost any school could adopt an affirmative action plan.

There is no question, however, that subsequent Supreme Court opinions, notably *Wygant* and *Croson*, have rejected broad state programs that purport to be remedial and that, presumably, would have satisfied Justice Brennan's standard for meeting the "present effects of past discrimination." And some members of the Court would limit any

Because a state does not have a compelling state interest in remedying the present effects of past *societal* discrimination, however, we must examine the district court's legal determination that the relevant governmental entity is the system of education within the state as a whole. Moreover, we also must review the court's identification of what types of present effects of past discrimination, if proven, would be sufficient under strict scrutiny review. Finally, where the state actor puts forth a remedial justification for its racial classifications, the district court must make a "factual determination" as to whether remedial action is necessary. *Wygant,* 476 U.S. at 277-78. We review such factual rulings for clear error.

1.

The Supreme Court has "insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant,* 476 U.S. at 274 (plurality opinion of Powell, J.) (citing *Hazelwood School Dist. v. United States,* 433 U.S. 299 (1977)).[40] In *Wygant,* the Court analyzed a collective

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remedial purpose to the actual victims of discrimination. *See Adarand,* 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in judgment) ("[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."). Nevertheless, we will not eschew use of the phrase "present effects of past discrimination," as we used this language in *Hopwood I,* 21 F.3d at 605, and anothe r circuit did so in *Podberesky v. Kirwan,* 38 F.3d 147, 153 (4th Cir.1994), *cert. denied,* 115 S. Ct. 2001 (1995). We will, however, limit its application in accordance with *Wygant* and *Croson.*

[40]*See Wygant,* 476 U.S. at 286 (opinion of O'Connor, J., concurring in part and concurring in judgment) ("The Court is in agreement that whatever the formulation employed, remedying past or present racial

bargaining agreement between a school board and a teacher's union that allowed the board to give minorities preferential treatment in the event of layoffs. A plurality rejected the theory that such a program was justified because it provided minority role models. *Id.* at 274-77 (plurality opinion). Such a claim was based upon remedying "societal discrimination," a rationale the Court consistently has rejected as a basis for affirmative action. Accordingly, the state's use of remedial racial classifications is limited to the harm caused by a specific state actor.[41]

Moreover, the plurality in *Wygant* held that before a state actor properly could implement such a plan, it "must ensure that . . . it has convincing evidence that remedial action is warranted." *Id.* at 277. *Accord id.* at 289 (O'Connor, J., concurring in part and concurring in judgment). The plurality felt that "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 276.

The *Croson* Court further discussed how to identify the relevant past discriminator. Writing for the Court, Justice O'Connor struck down a minority business set-aside program implemented by the City of Richmond and justified on remedial grounds. While the district court opined that sufficient evidence had been found by the city to believe that such a program was necessary to remedy the

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discrimination by a state actor is a sufficiently weighty state interest to warrant remedial use of a carefully constructed affirmative action program.").

[41] *See also id.* at 288 (O'Connor, J., concurring in part and concurring in judgment) ("I agree with the plurality that a government agency's interest in remedying 'societal' discrimination, that is discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.").

present effects of past discrimination in the construction industry, the Court held:

> Like the "role model" theory employed in *Wygant,* a generalized assertion that there had been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.' *Wygant,* 476 U.S. at 275 (plurality opinion). 'Relief' for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority businesses] in Richmond mirrored the percentage of minorities in the population as a whole.

488 U.S. at 498.[42] The Court refused to accept indicia of past discrimination in anything but "the Richmond construction industry." *Id.* at 505.

In addition, in a passage of particular significance to the instant case, the Court analogized the employment contractor situation to that of higher education and noted that "[l]ike claims that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.* at 499. Such claims were based upon "sheer speculation" about how many minorities would be in the contracting business absent past discrimination. *Id.*

Applying the teachings of *Croson* and *Wygant,* we conclude that the district court erred in expanding the remedial justification to reach all public education within the State of Texas. The Supreme Court repeatedly has warned that the use of racial remedies must be

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[42]Justice O'Connor was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy in this portion of the opinion.

carefully limited, and a remedy reaching all education within a state addresses a putative injury that is vague and amorphous. It has "no logical stopping point." *Wygant*, 476 U.S. at 275 (plurality opinion).

The district court's holding employs no viable limiting principle. If a state can "remedy" the present effects of past discrimination in its primary and secondary schools, it also would be allowed to award broad-based preferences in hiring, government contracts, licensing, and any other state activity that in some way is affected by the educational attainment of the applicants. This very argument was made in *Croson* and rejected:

> The "evidence" relied upon by the dissent, history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.

488 U.S. at 505. The defendants' argument here is equally expansive.[43]

Strict scrutiny is meant to ensure that the purpose of a racial preference is remedial. Yet when one state actor begins to justify racial preferences based upon the actions of other state agencies, the remedial actor's competence to determine the existence and scope

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[43]The fact that the plaintiffs named the State of Texas as one defendant does not mean that it is proper to scrutinize the state as the relevant past discriminator. This argument confuses a theory of liability with a justification for a limited racial remedy. The State of Texas simply may be responsible for the wrongs of the law school, which is a governmental entity the state has created. The Supreme Court, however, has limited the remedial interest to the harm wrought by a specific governmental unit.

of the harm–and the appropriate reach of the remedy–is called into question. The school desegregation cases, for example, concentrate on school districts–singular government units–and the use of interdistrict remedies is strictly limited. *See Missouri v. Jenkins,* 115 S. Ct. 2038, 2048 (1995); *Milliken v. Bradley,* 418 U.S. 717, 745 (1974) ("[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."). Thus, one justification for limiting the remedial powers of a state actor is that the specific agency involved is best able to measure the harm of its past discrimination.

Here, however, the law school has no comparative advantage in measuring the present effects of discrimination in primary and secondary schools in Texas. Such a task becomes even more improbable where, as here, benefits are conferred on students who attended out-of-state or private schools for such education. Such boundless "remedies" raise a constitutional concern beyond mere competence. In this situation, an inference is raised that the program was the result of racial social engineering rather a desire to implement a remedy.

No one disputes that in the past, Texas state actors have discriminated against some minorities in public schools. In this sense, some lingering effects of such discrimination is not "societal," if that term is meant to exclude all state action. But the very program at issue here shows how remedying such past wrongs may be expanded beyond any reasonable limits.

Even if, *arguendo,* the state is the proper government unit to scrutinize, the law school's admissions program would not withstand our review. For the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the "plus" given to applicants to remedy that harm. A broad program that sweeps in all minorities

with a remedy that is in no way related to past harms cannot survive constitutional scrutiny. Obviously, none of those predicates has been satisfied here.

We further reject the proposition that the University of Texas System, rather than the law school, is the appropriate governmental unit for measuring a constitutional remedy. The law school operates as a functionally separate unit within the system. As with all law schools, it maintains its own separate admissions program. The law school hires faculty members that meet the unique requirements of a law school and has its own deans for administrative purposes. Thus, for much the same reason that we rejected the educational system as the proper measure--generally ensuring that the legally-imposed racially discriminatory program is remedial--we conclude that the University of Texas System is itself too expansive an entity to scrutinize for past discrimination.[44]

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[44]And again, any such remedy here would be grossly speculative. As the defendants concede and the district court found, there is no recent history of overt sanctioned discrimination at the University of Texas. *Hopwood*, 861 F. Supp. at 572. Nor does the record even suggest such discrimination at any of the other component schools of the University of Texas System. Thus, any harm caused to the students of those institutions would be the result of the present effects of *past discrimination*.

We do note that the law school is not autonomous. In Texas, the management of higher education has been divided by the legislature into different "systems." *See* 12 TEX. JUR. 3D, *Colleges and Universities* § 2 (1993). The University of Texas at Austin, with which the law school is associated, is part of the University of Texas System. Tex. Educ. Code Ann. §§ 67.01 to 67.62 (West 1991). Accordingly, the legislature, which has ultimate control over the school, has delegated its "management and control" to the regents of the University of Texas System. *Id.* § 67.02. Thus, the law school is governed by both the legislature and the university's board of regents. Yet, while the state's higher authorities

In sum, for purposes of determining whether the law school's admissions system properly can act as a remedy for the present effects of past discrimination, we must identify the law school as the relevant alleged past discriminator. The fact that the law school ultimately may be subject to the directives of others, such as the board of regents, the university president, or the legislature, does not change the fact that the relevant putative discriminator in this case is still the law school. In order for any of these entities to direct a racial preference program at the law school, it must be because of past wrongs at that school.

2.

Next, the relevant governmental discriminator must prove that there are present effects of past discrimination of the type that justify the racial classifications at issue:

> To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program.

Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied,* 115 S. Ct. 2001 (1995). Moreover, as part of showing that the alleged present effects of past discrimination in fact justify the racial preference program at issue, the law school must show that it adopted the program specifically to remedy the identified present effects of the past discrimination.

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may have the power to require the law school to remedy its past wrongs, they may do so consistently with the Constitution only if the remedial actions are directed at the law school. This requirement is what the Supreme Court dictated by limiting the remedial purpose to the "governmental unit involved." *Wygant,* 476 U.S. at 274 (plurality opinion).

Here, according to the district court: "The evidence presented at trial indicates those effects include the law school's lingering reputation in the minority community, particularly with prospective students, as a "white" school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities." 861 F. Supp. at 572. Plaintiffs now argue that these three alleged effects are at most examples of societal discrimination, which the Supreme Court has found not to be a valid remedial basis. "The effects must themselves be examined to see whether they were caused by the past discrimination and whether they are of a type that justifies the program." *Podberesky,* 38 F.3d at 154.

As a legal matter, the district court erred in concluding that the first and third effects it identified–bad reputation and hostile environment–were sufficient to sustain the use of race in the admissions process. The Fourth Circuit examined similar arguments in *Podberesky,* a recent case that struck down the use of race-based scholarships. The university in that case sought, in part, to justify a separate scholarship program based solely upon race because of the university's "poor reputation within the African-American community" and because "the atmosphere on campus [was] perceived as being hostile to African-American students." *Id.* at 152.

The *Podberesky* court rejected the notion that either of these rationales could support the single-race scholarship program. The court reasoned that any poor reputation by the school "is tied solely to knowledge of the University's discrimination before it admitted African-American students." *Id.* at 154. The court found that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this." *Id.*

We concur in the Fourth Circuit's observation that knowledge of historical fact simply cannot justify current racial classifications. Even if, as the defendants argue, the law school may have a bad reputation in the minority community, "[t]he case against race-based preferences does not rest on the sterile assumption that American society is untouched or unaffected by the tragic oppression of its past." *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1079 (4th Cir. 1993). "Rather, it is the very enormity of that tragedy that lends resolve to the desire to never repeat it, and find a legal order in which distinctions based on race shall have no place." *Id.* Moreover, we note that the law school's argument is even weaker than that of the university in *Podberesky*, as there is no dispute that the law school has never had an admissions policy that excluded Mexican Americans on the basis of race.

The *Podberesky* court rejected the hostile-environment claims by observing that the "effects"–that is, racial tensions–were the result of present societal discrimination. 38 F.3d at 155. There was simply no showing of action by the university that contributed to any racial tension. Similarly, one cannot conclude that the law school's *past* discrimination has created any *current* hostile environment for minorities. While the school once did practice *de jure* discrimination in denying admission to blacks, the Court in *Sweatt v. Painter*, 339 U.S. 629 (1950), struck down the law school's program. Any other discrimination by the law school ended in the 1960's. *Hopwood*, 861 F. Supp. at 555.

By the late 1960's, the school had implemented its first program designed to recruit minorities, *id.* at 557, and it now engages in an extensive minority recruiting program that includes a significant amount of scholarship money. The vast majority of the faculty, staff, and students at the law school had absolutely nothing to do with any discrimination that the law school practiced in the past.

In such a case, one cannot conclude that a hostile environment is the present effect of past discrimination. Any racial tension at the

law school is most certainly the result of present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions.

Even if the law school's alleged current lingering reputation in the minority community–and the perception that the school is a hostile environment for minorities–were considered to be the present effects of past discrimination, rather than the result of societal discrimination, they could not constitute compelling state interests justifying the use of racial classifications in admissions. A bad reputation within the minority community is alleviated not by the consideration of race in admissions, but by school action designed directly to enhance its reputation in that community.

Minority students who are aided by the law school's racial preferences have already made the decision to apply, despite the reputation. And, while prior knowledge that they will get a "plus" might make potential minorities more likely to apply, such an inducement does nothing, *per se*, to change any hostile environment. As we have noted, racial preferences, if anything, can compound the problem of a hostile environment.[45]

The law school wisely concentrates only on the second effect the district court identified: underrepresentation of minorities because of past discrimination. The law school argues that we should consider the prior discrimination by the State of Texas and its educational system rather than of the law school. The school contends that this prior discrimination by the state had a direct effect on the educational attainment of the pool of minority applicants and that the discriminatory admissions program was

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[45]The testimony of several minority students underscores this point. They stated generally that they felt that other students did not respect them because the other students assumed that minorities attained admission because of the racial preference program.

implemented partially to discharge the school's duty of eliminating the vestiges of past segregation.

As we have noted, the district court accepted the law school's argument that past discrimination on the part of the Texas school system (including primary and secondary schools), reaching back perhaps as far as the education of the parents of today's students, justifies the current use of racial classifications.[46] No one disputes that Texas has a history of racial discrimination in education. We have already discussed, however, that the *Croson* Court unequivocally restricted the proper scope of the remedial interest to the state actor that had previously discriminated. 488 U.S. at 499. The district court squarely found that "[i]n recent history, there is no evidence of overt officially sanctioned discrimination at the University of Texas." 861 F. Supp. at 572. As a result, past

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[46]The argument is that because the state discriminated in its primary and secondary school systems, the students' educational attainment was adversely affected, and this harm extended to their higher education, thus justifying giving current applicants a "plus" based on race. This reasoning is especially important in justifying benefits for Mexican Americans, as there is no evidence that the law school implemented *de jure* (or even *de facto*) discrimination against this group in its admissions process. Because this logic ignores the relevant actions in this case, i.e., discrimination by the law school, it is not necessary for us to examine the potential causational flaws in the argument.

Moreover, if we did find that the past wrongs of Texas school districts were the sort of discrimination that the law school could address, the school still would have to prove the present effects of that past wrong. Without some strong evidence in the record showing that today's law school applicants still bear the mark of those past systems, such effects seem grossly speculative. The district court simply *assumed* that "[t]his segregation has handicapped the educational achievement of many minorities . . . ." 861 F. Supp. at 573. And we would still have to ask whether the program was narrowly tailored to this goal.

discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions.

The law school now attempts to circumvent this result by claiming that its racial preference program is really a "State of Texas" plan rather than a law school program. Under the law school's reading of the facts, its program was the direct result of the state's negotiations with what was then the United States Department of Health, Education and Welfare's Office for Civil Rights ("OCR"). To bring the Texas public higher education system into compliance with title VI, the state adopted the so-called "Texas Plan."

In light of our preceding discussion on the relevant governmental unit, this argument is inapposite. Even if the law school were specifically ordered to adopt a racial preference program, its implementation at the law school would have to meet the requirements of strict scrutiny.[47]

Moreover, these alleged actions in the 1980's are largely irrelevant for purposes of this appeal. There is no indication that the Texas Plan imposed a direct obligation upon the law school. To the contrary, the law school's admissions program was self-initiated. Moreover, the current admissions program was formulated primarily in the 1990's, and the district court did not hold otherwise. *See* 861 F. Supp. at 557 ("Against this historical

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[47]To the extent that the OCR has required actions that conflict with the Constitution, the directives cannot stand. The Supreme Court has addressed required state compliance with federal law in the voting rights context. *Miller v. Johnson*, 115 S. Ct. 2475, 2491, (1995) ("As we suggested in *Shaw* [*v. Reno*, 113 S. Ct. 2816, 2830-31 (1993)], compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary *under a constitutional reading and application of those laws.*") (emphasis added).

backdrop [including Texas's dealing with the OCR], the law school's commitment to affirmative action in the admissions process evolved."). Thus it is no more correct to say that the State of Texas implemented the program at issue than it is to assert that the Commonwealth of Virginia, not the City of Richmond, was responsible for the minority set-aside program in *Croson.*

The district court also sought to find a remedial justification for the use of race and, at the same time, attempted to distinguish *Croson* using *United States v. Fordice,* 505 U.S. 717 (1992). The court held that the law school had a compelling interest to "desegregate" the school through affirmative action.

The reliance upon *Fordice* is misplaced, however. The district court held that *Fordice* 's mandate to schools "to eliminate every vestige of racial segregation and discrimination" made *Croson* inapplicable, 861 F. Supp. at 571, and reasoned that this mandate includes the effects of such prior practices or policies.

Fordice does not overrule *Croson.* The central holding of *Fordice* is that a state or one of its subdivisions must act to repudiate the continuing "policies or practices" of discrimination. 505 U.S. at 731-32.[48] In other words, a state has an affirmative duty to remove policies, tied to the past, by which it continues to discriminate. The *Fordice* Court did not address, in any way, a

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[48]In more detail, the *Fordice* Court said the following:

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects–whether by influencing student enrollment or by fostering segregation in other facets of the university system–and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.

505 U.S. at 731.

state actor's duty to counter the present effects of past discrimination that it did not cause.[49]

In sum, the law school has failed to show a compelling state interest in remedying the present effects of past discrimination sufficient to maintain the use of race in its admissions system. Accordingly, it is unnecessary for us to examine the district court's determination that the law school's admissions program was not narrowly tailored to meet the compelling interests that the district court erroneously perceived.[50]

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[49]In *Croson,* Justice O'Connor did argue that a state may act to prevent its powers from being used to support *private* discrimination. 488 U.S. at 491-92 (plurality opinion) ("[A] state or local subdivision, (if delegated the authority from the State) has the authority to eradicate the effects of *private discrimination* within its own legislative jurisdiction.") (emphasis added). Hence, a specific state actor can act to prevent the state from being used as a "passive participant" in private discrimination. This power does not create wide-ranging authority to remedy societal discrimination, however.

[50]The plaintiffs argue that indeed there is no narrow tailoring, for at least the following reasons: (1) In 1992, more than two-thirds of all admission offers to blacks, and a majority of all blacks who matriculated, involved out-of-state residents, thus undercutting the law school's stated purpose of remedying past discrimination in Texas. (2) The system of preferences has no termination date, thus indicating that there is no connection between the plan and a *bona fide* remedial purpose. (3) Preference is given even to blacks and Mexican Americans who graduated from private secondary schools and thus did not suffer from state-ordered racial discrimination.

The law school apparently chose admission goals of 5% blacks and 10% Mexican Americans because those are the respective percentages of college graduates in Texas who are black and Mexican American. Nothing in the record, however, establishes any probative correlation between the degree of past discrimination and the percentage of students

IV.

While the district court declared the admissions program unconstitutional, it granted the plaintiffs only limited relief. They had requested injunctive relief ordering that they be admitted to law school, compensatory and punitive damages, and prospective injunctive relief preventing the school from using race as a factor in admissions.

A.

We must decide who bears the burden of proof on the damages issue. The district court refused to order the plaintiffs' admission (or award any compensatory damages), as it found that they had not met their burden of persuasion in attempting to show that they would have been admitted absent the unconstitutional system. 861

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from a minority group who graduate from college.

There is no history either of *de jure* discrimination against Mexican Americans in education at any level in Texas or of *de facto* discrimination against Mexican Americans by the law school. Therefore, it is puzzling that the law school would set an admissions goal for Mexican Americans that is twice that of blacks, as to whom the history of *de jure* discrimination in Texas Education in general, and by the law school in particular, is irrefutable.

If fashioning a remedy for past discrimination is the goal, one would intuit that the minority group that has experienced the most discrimination would have the lowest college graduation rate and therefore would be entitled to the most benefit from the designed remedy. The goals established by the law school are precisely the reverse of that intuitive expectation and are more reflective of a goal of diversity (which we hold is not compelling) than of a goal of remedying past discrimination.

F. Supp. at 579-82[51]. The law school now argues that the plaintiffs had the burden of persuasion on the issue of damages and that the district court's findings are not clearly erroneous.[52] The plaintiffs maintain, as they did in the district court, that once they had shown a constitutional violation, the burden of persuasion shifted to the school to show that the denial of admission was not caused by that violation.

The well-established rule is that in order to collect money damages, plaintiffs must prove that they have been injured. *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978). Several Supreme Court cases, however, allow for a transfer of burden upon proof of discrimination. *See Mt. Healthy City Sch., Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977).[53]

In *Mt. Healthy*, a discharged school teacher sued for reinstatement, claiming his termination was a result of comments he had made on a radio show, a violation of his First and Fourteenth Amendment rights. The Court devised a test of "causation" that placed the burden of proving no harm on the defendant:

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[51]This finding also affected the court's analysis in denying prospective relief and compensatory damages.

[52]The district court applied a burden-shifting scheme similar to the methodology used in the title VII context. 861 F. Supp. at 579-80 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)). The law school concedes that the burden-shifting exercise was unnecessary, but it maintains nonetheless that the "ultimate burden of proof," including proof of damages, rests upon the plaintiffs. *See id.*

[53] Some of Justice Powell's *dicta* in *Bakke* also squarely supports the plaintiffs' claim that once discrimination is proved, the defendant bears the burden of proving no damage. *Bakke*, 438 U.S. at 320 (opinion of Powell, J.).

> Initially, . . . the burden was properly placed upon the respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"–or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to the respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287. In *Arlington Heights*, the Court applied a similar rule where the decision of a zoning board was challenged as racially discriminatory. *See* 429 U.S. at 270 n.21. In sum, these cases allow a defendant, who intended to discriminate or otherwise act unconstitutionally, to show that its action would have occurred regardless of that intent.

Courts are split on whether the *Mt. Healthy* rubric applies in racial preference cases.[54] We conclude that the *Mt. Healthy* methodology is appropriate in the instant case. The *Mt. Healthy*

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[54]*Compare Henson v. University of Ark.*, 519 F.2d 576, 577-78 (8th Cir. 1975) (per curiam) (placing burden of persuasion on white applicant to show affirmative action program prevented her admission) *and Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475 F. Supp. 1318, 1345 (W.D.N.C.1979) (holding that plaintiff in non-class action bears burden of proving damages) *with Donnelly v. Boston College*, 558 F.2d 634, 635 (1st Cir. 1977) (*dictum*) (citing *Bakke* and *Mt. Healthy*, but finding no causation, as evidence showed that plaintiff would not have been admitted regardless of affirmative action) *and Heit v. Bugbee*, 494 F. Supp. 66, 66-67 (E.D. Mich. 1980) (adopting *Bakke* and *Mt. Healthy* reasoning *in toto* for firefighter's reverse discrimination claims) *and United States v. McDonald*, 553 F. Supp. 1003, 1006 (S.D.Tex. 1983) (*dictum*) (same for discriminatory criminal prosecution).

plaintiff, like the present plaintiffs, brought a constitutional challenge, and his injuries were analogous to the injuries alleged here. As we have said, the title VII burden-shifting scheme is designed to determine whether a violation of law has occurred.

In this case, there is no question that a constitutional violation has occurred (as the district court found) and that the plaintiffs were harmed thereby. *See Adarand,* 115 S. Ct. at 2105 ("The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' ") (citation omitted). The *Mt. Healthy* burden-shifting exercise simply gives the defendant law school a second chance of prevailing by showing that the violation was largely harmless.

As the district court held, to the contrary, that plaintiffs had the burden, it should revisit this issue in light of what we have said in both the liability and remedial portions of this opinion.[55] In the event that the law school is unable to show (by a preponderance of the evidence) that a respective plaintiff would not have been admitted to the law school under a constitutional admissions system, the court is to award to that plaintiff any equitable and/or monetary relief it deems appropriate.

Obviously, if the school proves that a plaintiff would not have gained admittance to the law school under a race-blind system, that plaintiff would not be entitled to an injunction admitting him to the school. On the other hand, the law school's inability to establish a

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[55]The district court concluded that the plaintiffs proved only that they had been denied equal treatment but had failed to "prove an injury-in-fact." 861 F. Supp. at 582. To the extent that the court felt that plaintiffs failed to show injury-in-fact because they failed to prove that they would have been admitted under a constitutional admissions system, this conclusion should be revisited on remand, where the district court must apply the proper burden and redetermine whether plaintiffs would have been admitted.

plaintiff's non-admission--if that occurs on remand--opens a panoply of potential relief, depending in part upon what course that plaintiff's career has taken since trial in mid-1994. It then would be up to the district court, in its able discretion, to decide whether money damages[56] can substitute for an order of immediate admission--relief that would ring hollow for a plaintiff for whom an education at the law school now is of little or no benefit.[57]

Additionally, the district court erred in holding that plaintiffs did not prove that defendants had committed intentional discrimination under title VI. "Intentional discrimination," as used in this context, means that a plaintiff must prove "that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, *intended* to treat similarly situated persons differently on the basis of race."

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[56]We do not opine on any Eleventh Amendment immunity in this case. *See, e.g., United Carolina Bank v. Board of Regents*, 665 F.2d 553, 561 (5th Cir. Unit A 1982) (holding that the Eleventh Amendment barred a civil rights suit brought by a professor against university officials in their official capacities). This issue is simply not before us.

[57]For example, if the school is unable to show that plaintiff Carvell would not have gained admission even under a constitutional admissions system, he may be entitled to be compensated for the difference, to which he testified, between tuition at the law school and tuition at Southern Methodist University School of Law, which he attended instead. The district court should also consider the following paradox: The law school argued strenuously that plaintiff Elliott did not have standing to sue, as he had been offered admission to the school--albeit at the last moment--and had failed to accept that offer. The district court found that this offer of admission had not been communicated to Elliott. 861 F. Supp. at 566. In considering damages, however, the court held that "in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process." *Id.* at 581. The district court should re-examine these contradictory results.

Castaneda v. Pickard, 648 F.2d 989, 1000 (5th Cir. Unit A June 1981); *see also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582 (1983). While we agree with the district court's conclusion that the various defendants acted in good faith, there is no question that they intended to treat the plaintiffs differently on account of their race.

B.

The plaintiffs argue that, because they proved a constitutional violation, and further violations were likely to result, the district court erred in denying them prospective injunctive relief. We review denials of this sort of relief for an abuse of discretion. *See, e.g., Peaches Entertainment Corp. v. Entertainment Repertoire Associates,* 62 F.3d 690, 693 (5th Cir.1995). The law school avers that the district court was well within its equitable discretion in denying relief, especially as the school had abandoned the practices that the district court had found were unconstitutional--*to-wit,* the use of separate admissions committees for whites and minorities.

We review denials of prospective injunctive relief as we would any other denial of permanent injunctive relief under Fed.R.Civ.P. 65, keeping in mind, however, the questions of mootness, ripeness, and standing. *See generally* 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2942 (2d ed. 1995). That treatise notes that

> [p]erhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the court's discretion. Of course, in some situations the facts and relevant law may indicate that an injunction clearly should be granted or denied. However, in most cases the determination whether to issue an injunction involves a balancing of interests of the parties who might be affected by the court's decision--the hardship on the plaintiff if relief is denied as compared

> to the defendant if relief is granted and the extent to which the latter hardship can be mitigated by requiring a security bond. Not surprisingly, therefore, the court's decision depends on the circumstances of each case.

Id. at 41-42. Accordingly, the usual practice upon reversal of a denial of injunctive relief is to remand for a reweighing of the equities. *Id.* § 2962, at 448; *See, e.g., James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354-55 (5th Cir. 1977). In other situations, the appellate court may order the district court to enter an injunction. *See, e.g., Southeastern Promotions, Ltd. v. City of Mobile*, 457 F.2d 340 (5th Cir. 1972).

According to the district court, the school had abandoned the admissions procedure–consisting of the separate minority subcommittee–that was used in 1992, 1993, and 1994. The court reasoned that, as a new procedure was developed for 1995, a prospective injunction against the school was inappropriate. We conclude, however, that, while the district court may have been correct in deciding that the new procedure eliminates the constitutional flaws that the district court identified in the 1992 system, there is no indication that the new system will cure the additional constitutional defects we now have explained.

The new system utilizes a small "administrative admissions group" and does not use presumptive admission and denial scores. *See Hopwood*, 861 F. Supp. at 582 n.87. Most significantly, there is no indication that in employing the new plan, the law school will cease to consider race *per se* in making its admissions decisions. To the contrary, as the district court recognized, the law school continues to assert that overt racial preferences are necessary to the attainment of its goals. *See Hopwood*, 861 F. Supp. at 573-75.

The district court has already granted some equitable relief: It directed that the plaintiffs be permitted to re-apply to the law school without incurring further administrative costs. In accordance with

this opinion, the plaintiffs are entitled to apply under a system of admissions that will not discriminate against anyone on the basis of race. Moreover, the plaintiffs have shown that it is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction to the effect that it may not do so for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.

It is not necessary, however, for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion. If an injunction should be needed in the future, the district court, in its discretion, can consider its parameters without our assistance. Accordingly, we leave intact that court's refusal to enter an injunction.

C.

The plaintiffs contend that the district court's application of the wrong standard causes it to deny punitive damages. The plaintiffs aver that the court applied an animus standard, when it should have asked whether the school acted with "reckless indifference" to their constitutional rights. They ask for a remand on this issue.

It is not apparent, from the record, what standard the district court applied in considering the punitive damages issue. The court did determine, however, that the law school had always acted in good faith. This is a difficult area of the law, in which the law school erred with the best of intentions. As a result, the plaintiffs have not met the federal standard for punitive damages as stated in *Smith v. Wade*. 461 U.S. 30, 56 (1983). Thus, we agree with the district court that punitive damages are not warranted. We note, however, that if the law school continues to operate a disguised or

overt racial classification system in the future, its actors could be subject to actual and punitive damages.

V.

Consolidated with the appeal of the merits issues of this appeal is No. 94- 50569, challenging the district court's denial of a motion to intervene. The proposed intervenors--the Thurgood Marshall Legal Society and the Black Pre-Law Association (the "associations")--ask this court, for the second time, for the right to intervene. On their first attempt, the associations moved to intervene prior to trial either as of right or by permission. The district court denied intervention, and we affirmed. *See Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994) (per curiam) ("*Hopwood I*").

Now, following the trial, the associations believe they can show that the law school has failed to assert one of their proposed defenses, a circumstance they contend establishes their right to intervene. We apply the law of the case doctrine and dismiss No. 94-50569 for want of jurisdiction.

A.

The proposed intervenors are black student organizations at the University of Texas at Austin and its law school that, just prior to the trial of the merits appeal, sought to intervene, arguing that the law school would not effectively protect their interests in continuing racial preferences at the law school. The district court denied the proposed intervention on the ground that the law school and the two associations had the same objective: preservation of the status quo.

On expedited appeal, this court affirmed on the ground that the associations had failed to show that the law school had an interest different from theirs. We also commented that the two groups had failed to show "a separate defense of the affirmative action plan that

the State has failed to assert." *Id.* at 606. The panel implicitly considered and rejected, as one potential divergence of interests, the possibility that the law school would not raise a defense based upon the legality of the use of TI scores under title VI, as the associations argued that possibility as one basis for intervention.

After their first motion to intervene was denied, the associations remained involved in the case. Throughout the course of the trial, they acted as *amici curiae*. And, at the close of trial but before judgment, the district court intimated that it would allow them to submit information for the record. Accordingly, the associations sought to introduce testimonial and documentary evidence supporting their arguments that (1) the TI by itself was an unlawful basis for admissions decisions under title VI and (2) that affirmative action at the university was constitutionally required. The plaintiffs opposed the introduction of evidence on these "new defenses," and the district court agreed. The associations were allowed to submit *amicus* briefs and highlight evidence that was already in the record but were not allowed to raise new issues or supplement the record.

Shortly thereafter, the associations again sought to intervene under Fed. R. Civ. P. 24(a)(2) (intervention as of right), claiming that the law school had failed to raise their two "new defenses" and, accordingly, that events now showed that that representation inadequately protected their interests. They sought to reopen the record to introduce evidence supporting these arguments.

The district court summarily refused this request. That order is the focus of this separate appeal, in which the associations present only the title VI defense and ask to be allowed to present such evidence only if we do not affirm the judgment.

B.

There is no caselaw in this circuit that directly addresses how to review successive motions to intervene.[58] The parties direct us to *Hodgson v. United Mine Workers,* 473 F.2d 118, 125-26 (D.C. Cir. 1972); *United States Envt'l Protection Agency v. City of Green Forest,* 921 F.2d 1394, 1401 (8th Cir. 1990), *cert. denied,* 502 U.S. 956 (1991); and *Meek v. Metropolitan Dade County,* 985 F.2d 1471, 1477 (11th Cir. 1993). These courts, which were examining whether the appeal from a successive motion was timely as per the appellate requirements, devised the general rule that a second motion would be treated as independent of the first if it was reached under materially changed circumstances.

Here, the associations assume that their second intervention motion is separate and distinct from their earlier failed attempt, because the law school's failure to raise their proposed defense

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[58]There is circuit law regarding successive motions, but the pertinent opinions do not examine the standard of review explicitly. *See, e.g., Kneeland v. National Collegiate Athletic Ass'n,* 806 F.2d 1285 (5th Cir.) (implicit application of *de novo* review without discussion of standard), *cert. denied,* 484 U.S. 817 (1987); *United States v. Louisiana,* 669 F.2d 314, 315 (5th Cir.1982) (application of abuse of discretion review for timeliness determination on second motion where proposed intervenor failed to argue for first motion after remand); *Calvert Fire Ins. Co. v. Environs Dev. Corp.,* 601 F.2d 851, 857 (5th Cir. 1979) (implicit application of *de novo* review where district court treated second motion as both a reconsideration of prior motion and a new motion).

constitutes a changed circumstance.[59] Thus, they ask that we engage in *de novo* review of their motion.

The plaintiffs, however, note that this motion was entitled a "renewed motion for intervention." The plaintiffs argue that the district court was reconsidering its previous denial order under its Fed. R. Civ. P. 60(b) powers, and we should review merely for abuse of discretion.

C.

While the "changed circumstances" test may have merit–an issue we do not decide today–we do not find it applicable to this case. Instead, the "law of the case" doctrine militates against reconsideration of this motion. Normally, when a prior panel

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[59]The associations ground this argument in language taken from the prior appeal. One necessary element for intervention is a showing that the present parties will inadequately represent the proposed intervenors' interests. While the associations lost on this ground on the last appeal, they now claim that the opinion supports the argument that the law school's defense is inadequate. In the last appeal, we cited *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990), as support for the following statement: "Nor have the proposed intervenors shown that they have a separate defense of the affirmative action plan that the State has failed to assert." *Hopwood I*, 21 F.3d at 606. Because the law school, now after trial, still has not asserted the associations' title VI defense, the associations maintain that they now can meet their burden.

In *Jansen*, however, the court found that the proposed intervenors had an interest different from that of the defendant city. 904 F.2d at 343. This was the basis for that court's holding that the city's rpresentation was inadequate. *See id.* ("Proffering this alleged violation of the consent decree as an affirmative defense is directly counter to the City's *interest.*") (emphasis added). Here, we have already found that the law school's and the associations' interests are the same. *Jansen* therefore does not support intervention.

discusses an issue on the merits, a later panel cannot reach a contrary conclusion under the preclusive principle of law of the case. *See Williams v. City of New Orleans*, 763 F.2d 667, 669 (5th Cir. 1985). There is no question that the *Hopwood I* panel addressed the intervention as a matter of right *de novo*, on the merits, including the potential that the law school would not raise every defense proposed by the associations.

The question of whether we can rely upon the law of the case doctrine, however, is clouded because of the "anomalous" rule that exists in this circuit concerning the procedural posture of these intervention cases. Under that rule, we have only provisional jurisdiction to review a district court's denial of a motion to intervene.

If we agree with the district court, our jurisdiction "evaporates." Hence, the denial of leave to intervene when the party had a right to intervene is immediately appealable. On appeal, however, our rule "requires a merit review of any claim of intervention in order for [us] to determine whether or not the district court's order is appealable." *Weiser v. White*, 505 F.2d 912, 916 (5th Cir. 1975). If the claim is without merit, then the order "is not appealable, the appellate court has no jurisdiction, and the appeal should be dismissed." *Id.* Thus, despite the merits review, this is a dismissal for want of jurisdiction.[60]

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[60]At least one set of commentators has eschewed this traditional rule. Their position is that "[a]ny denial of intervention should be regarded as an appealable final order." 7C WRIGHT ET AL., *supra*, § 1923, at 508. Under this proposed rule, the federal court would "affirm denial of intervention when previously, having determined on the merits that the trial court was right, it would dismiss the appeal." *Id.* at 509. We have acknowledged that this would be the better rule. *See Korioth v. Briscoe*, 523 F.2d 1271, 1279 n.26 (5th Cir. 1975) (citing WRIGHT ET AL., *supra*). In fact, the *Hopwood I* panel affirmed rather than dismissing for want of

Our anomalous rule complicates the analysis of the preclusive effects of the prior panel decision, because dismissals for lack of jurisdiction normally do not have preclusive effect. *See, e.g.*, Fed. R. Civ. P. 41(b). Accordingly, while appellate courts review denials of intervention motions on the merits, it is uncertain to what extent such a review has preclusive effect. Nonetheless, we recognize the possibility of issue preclusion on the question of jurisdiction itself.

While a dismissal for lack of jurisdiction does not operate as an adjudication on the merits, "[t]his provision means only that the dismissal permits a second action on the same claim that corrects the deficiency found in the first action. The judgment remains effective to preclude relitigation of the precise issue of jurisdiction or venue that led to the initial dismissal." 7C WRIGHT ET AL., *supra*, § 4436, at 338.[61] Thus, a party is precluded from successively appealing the same intervention motion.

Here, the record shows that the associations raised this same title VI argument before the *Hopwood I* panel in both their brief and

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jurisdiction. Under the suggested rule, because we would have a final order on the merits from a previous panel on this issue, this case would probably be at an end. Nonetheless, as the anomalous rule constitutes our circuit caselaw, we are bound to follow it.

[61]A dismissal for want of jurisdiction, however, leaves open the possibility that the deficiency can be cured. If that occurs, no issue preclusion exists. *See* 7C WRIGHT ET AL., *supra*, § 4436, at 338. It is at this point in the analysis that "changed circumstances" may become relevant. Arguably, the "changed circumstances" analysis, in effect, "cures" the earlier jurisdictional deficiency. Thus, if the circumstances of the case change to such an extent that jurisdiction would lie, the subsequent motion to intervene should not be dismissed for lack of jurisdiction. In effect, the posture of the case has changed, as it would any time a given jurisdictional problem is cured.

at oral argument. That panel, reviewing *de novo* the merits of the associations' claims, denied intervention. Accordingly, the last panel implicitly addressed this issue, and we must respect its decision to deny intervention. The law of the case doctrine prevents merits review, and we dismiss No. 94-50569 for want of jurisdiction.[62]

VI.

In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school. Because the law school has proffered these justifications for its use of race in admissions, the plaintiffs have satisfied their burden of showing that they were scrutinized under an unconstitutional admissions system. The plaintiffs are entitled to reapply under an admissions

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[62]In *Hopwood I*, we decided that (1) the interests of the associations were adequately represented by the law school and the state, and (2) as a practical matter, disposition in the principal suit would not impair or impede either of those groups' interests. 21 F.3d at 605. The law of the case doctrine militates against revisiting that decision here. For purposes of any future litigation, however, we note a necessary effect of our previous holding when coupled with the law school's failure to raise a title VI argument: Neither the district court's decision nor ours in this appeal is binding on the associations as res judicata, law of the case, collateral estoppel, or any other theoretical bar.

In short, as the title VI issue has not been litigated, the associations are not precluded from instituting a separate and independent title VI challenge to the law school's use of the TI. We neither express nor imply an opinion on the viability of such a challenge.

system that invokes none of these serious constitutional infirmities. We also direct the district court to reconsider the question of damages, and we conclude that the proposed intervenors properly were denied intervention.

In No. 94-50569, the appeal is DISMISSED for want of jurisdiction. In No. 94-50664, the judgment is REVERSED and REMANDED for further proceedings in accordance with this opinion.

WIENER, Circuit Judge, specially concurring.

"We judge best when we judge least, particularly in controversial matters of high public interest."[1] In this and every other appeal, we should decide only the case before us, and should do so on the narrowest possible basis. Mindful of this credo, I concur in part and, with respect, specially concur in part.

The sole substantive issue in this appeal is whether the admissions process employed by the law school for 1992 meets muster under the Equal Protection Clause of the Fourteenth Amendment. The law school offers alternative justifications for its race-based admissions process, each of which, it insists, is a compelling interest: (1) remedying the present effects of past discrimination (present effects) and (2) providing the educational benefits that can be obtained only when the student body is diverse (diversity).[2]

As to present effects, I concur in the panel opinion's analysis: Irrespective of whether the law school or the University of Texas system as a whole is deemed the relevant governmental unit to be

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[1] *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 931 (5th Cir.1993) (Wiener, J., dissenting).

[2] *See Hopwood v. State of Tex.*, 861 F. Supp. 551, 570 (W.D. Tex. 1994).

tested,[3] neither has established the existence of present effects of past discrimination sufficient to justify the use of a racial classification.[4] As to diversity, however, I respectfully disagree with the panel opinion's conclusion that diversity can never be a compelling governmental interest in a public graduate school. Rather than attempt to decide that issue, I would take a considerably narrower path–and, I believe, a more appropriate one–to reach an equally narrow result: I would assume arguendo that diversity can be a compelling interest but conclude that the admissions process here under scrutiny was not narrowly tailored to achieve diversity.

I.

THE LAW

A. Equal Protection

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[5] Accordingly, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under *strict scrutiny.*"[6] Racial classifications will survive strict scrutiny "only if they are narrowly tailored measures that further compelling governmental interests."[7] Thus, strict scrutiny comprises two inquiries of equal valence; the

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[3]I agree with the panel opinion that the defendants are overreaching when they urge that the State of Texas or its primary and secondary school system should be the relevant governmental unit.

[4]Panel Opn. at 43 & n.44.

[5]U.S. Const., amend. 14, § 1.

[6]*Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2115 (1995) (emphasis added).

[7]*Id.*

"compelling interest" inquiry and the "narrow tailoring" inquiry.[8] Moreover, these inquiries are conjunctive: To avoid constitutional nullity, a racial classification must satisfy *both* inquiries. Failure to satisfy either is fatal.

B. Racial Classification

None dispute that the law school's admission process for 1992 employed a racial classification. Depending on an applicant's race, his request for admission was considered under one of three different (and, as explained in the panel opinion, often dispositive[9]) TI admission ranges: one for blacks only, a second for Mexican Americans only, and a third for all other races and nationalities, including non-Mexican Hispanic Americans. In short, each applicant for admission to the law school was classified by race, and his application was treated differently according into which of those three racial classifications it fell. Thus, the law school's 1992 admissions process, like all racial classifications by the government, is subject to strict scrutiny.[10]

C. Strict Scrutiny

The law school contends that it employs a racially stratified admissions process to obtain, *inter alia,* the educational benefits of

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[8]*See id.* at 2117. ("Racial classifications . . . *must* serve a compelling governmental interest and *must* be narrowly tailored to further that interest.") (emphasis added); *see also Miller v. Johnson,* 115 S. Ct. 2475, 2490 (1995) ("To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling governmental interest.").

[9]*See* Panel Opn. at 6-7 (explaining that a Mexican American or a black applicant with a TI of 189 is presumptively admitted, while an "other race" applicant with an identical TI is presumptively denied).

[10]*Adarand,* 115 S. Ct. at 2115.

a diverse student body. Translated into the constitutional idiom, the law school insists that achieving student body diversity in a public graduate school is a compelling governmental interest. The law school invokes the opinion of Justice Powell in *Regents of the University of California v. Bakke*[11] to support that postulate. The panel opinion rejects that support, concluding that from its inception *Bakke* had little precedential value and now, post-*Adarand*, has none. My fellow panelists thus declare categorically that "*any* consideration of race or ethnicity by the law school for the purposes of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."[12]

This conclusion may well be a defensible *extension* of recent Supreme Court precedent, an extension which in time may prove to be the Court's position. It admittedly has a simplifying appeal as an easily applied, bright-line rule proscribing any use of race as a determinant. Be that as it may, this position remains an extension of the law--one that, in my opinion, is both overly broad and unnecessary to the disposition of this case. I am therefore unable to concur in the majority's analysis.

My decision not to embrace the ratio decidendi of the majority opinion results from three premises: First, if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement. Second, Justice O'Connor expressly states that *Adarand* is not the death knell of affirmative action–to which I would add, especially *not* in the

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[11]438 U.S. 265 (1978). Justice Powell opens his discussion of equal protection and diversity in *Bakke* by stating that the "attainment of a diverse student body . . . clearly [is] a constitutionally permissible goal for an institution of higher education," *id.* at 311-12, and, in the unique context of institutions of higher learning, he concludes that diversity is a compelling interest. *Id.* at 312.

[12]Panel Opn. at 25 (emphasis added).

framework of achieving diversity in public graduate schools.[13] Third, we have no need to decide the thornier issue of compelling interest, as the narrowly tailored inquiry of strict scrutiny presents a more surgical and–it seems to me–more principled way to decide the case before us.[14] I am nevertheless reluctant to proceed with a narrowly tailored inquiry without pausing to respond briefly to the panel opinion's treatment of diversity in the context of the compelling interest inquiry.

D. Is Diversity a Compelling Interest?

Along its path to a per se ban on any consideration of race in attempting to achieve student body diversity, the panel opinion holds (or strongly implies) that remedying vestigial effects of past discrimination is the only compelling interest that can ever justify racial classification.[15] The main reason that I cannot go along with the panel opinion to that extent is that I do not read the applicable Supreme Court precedent as having held squarely and unequivocally either that remedying effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest. Indeed, the panel opinion itself

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[13] *Adarand*, 115 S. Ct. at 2117 ("When race- based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

[14] *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 224 (1991) (O'Connor, J. dissenting) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them.") (citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157, (1984)).

[15] Panel Opn. at 26-29.

hedges a bit on whether the Supreme Court's square holdings have gone that far,[16] particularly in the realm of higher education.[17]

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[16]The Court *appears* to have decided that "there is *essentially* only one compelling state interest to justify racial classification: remedying past wrongs." Panel opn. at 944-45 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (emphasis added)).

[17]Panel Opn. at 28 n.27, (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286, (1986) (O'Connor, J. concurring in part and concurring in the judgment)). ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found to be sufficiently 'compelling' at least in the context of higher education to support the use of racial considerations in furthering that interest.").

Between the difficulty inherent in applying *Bakke*[18] and the minimal guidance in *Adarand*,[19] the definition and application of

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[18]I readily concede that problems are encountered when efforts are made to apply the Supreme Court's *Bakke* decision. Panel Opn. at 941-42, 944, & 944 (respectively pointing out that (1) *Bakke* comprises multiple opinions and divergent analyses, (2) no Justice, other than Justice Powell, discusses diversity, and (3) *Bakke* is questioned in *Adarand*). The panel opinion fails to describe this last problem with precise accuracy. That opinion's expurgated version of the quotation at 26, lines 736-42 makes it appear as though the *Adarand* majority questioned *Bakke*. In full, the sentence reads "[the Court's] failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action." Thus, although the Court acknowledges that *Bakke* et al. left things unresolved, I do not read this quotation, (as the panel opinion suggests) as an order to throw out *Bakke*–bath water, baby, and all.

Nevertheless, the fractured nature of *Bakke*'s holding has left more questions than answers in its wake. As observed in the instant panel opinion, there has been "no [other] indication from the Supreme Court, . . . [whether] the state's interest in diversity [in higher education] constitutes a compelling justification for governmental race-based classifications." Panel Opn. at 28. I agree that *Bakke* is the only indication that diversity is a compelling interest. But, unlike the panel opinion, which jettisons Justice Powell's *Bakke* opinion because of its singularity, I find that singularity to be precisely the factor that makes Justice Powell's opinion the most pertinent Supreme Court statement on this issue. Therefore, when and if the Supreme Court addresses this case or its analog, the Court will have no choice but to go with, over, around, or through Justice Powell's *Bakke* opinion. By assuming, as I do, that diversity is a compelling interest, however, these problems are avoided altogether.

[19]Recently, in *Adarand* the Supreme Court stated that it had "altered the [equal protection] playing field in some important respects." 115 S. Ct. at 2118. In her opinion for the majority, however, Justice O'Connor

the compelling interest inquiry seems to be suspended somewhere in the interstices of constitutional interpretation. Until further clarification issues from the Supreme Court defining "compelling interest" (or telling us how to know one when we see one), I perceive no "compelling" reason to rush in where the Supreme Court fears–or at least declines–to tread. Instead, I would pretermit any attempt at a compelling interest inquiry and accept Justice O'Connor's invitation to apply the Court's more discernible and less intrusive "narrow tailoring" precedent.[20] Thus, for the purpose of

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repeatedly emphasizes that *Adarand* did not drive a stake through the heart of affirmative action. To the contrary, she emphatically states, "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " *Id.* at 2117 (quoting *Fullilove*, 448 U.S. 448, 519 (Marshall, J., concurring in judgment)). Moreover, "[w]hen race-based action is necessary to further a compelling interest, such action is withi the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." *Id.*

It seems to me that as a practical matter, *Adarand* resolves very little. In fact, the much heralded change is quite limited: Race-based classifications, imposed by the *federal* government, are now subject to strict scrutiny. Curiously (or perhaps not so curiously given the enigmatic difficulty of the task), the Supreme Court declined to define compelling interest or to tell us how to apply that term. Indeed, the Court did not even decide the case before it, opting instead to remand the case for further adjudication.

[20] *Id.* ("[W]hen race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

this appeal I *assume*, without deciding, that diversity is a compelling interest,[21] and proceed to the narrowly tailored inquiry.

E. Test for Narrow Tailoring

When strictly scrutinizing a racial classification for narrow tailoring, the first question is "What is the purpose of this racial classification?"[22] The present effects rationale having proven feckless in this case, today's answer to that first question is a given: The law school's purpose is diversity. Accordingly, I perceive the

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[21]Although I assume without deciding that diversity is a compelling interest, if I had no choice but to address compelling interest I would do so in the *context* in which the issue is presented, i.e., the constitutionally permissible means of constructing an entering a class at a public graduate or professional school. This unique context, first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the re- districting context; it comprises only the public higher education context and implicates the uneasy marriage of the First and Fourteenth Amendments. *See Bakke*, 438 U.S. at 311-12. Consequently, we play with fire when we assume an easy crossover of Fourteenth Amendment maxims pronounced in cases decided in such other contexts. The panel opinion concludes that this contextual distinction is unimportant, holding that, whatever the context, remedying the past effects of discrimination is the only compelling interest that can justify a racial classification. Panel Opn. at 26-29. That opinion acknowledges, however, that Supreme Court precedent does not go this far: namely, the higher education context is different. Indeed the panel opinion quotes Justice O'Connor's words expressly stating that higher education is different. Panel Opn. at 28 n.27 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found to be sufficiently 'compelling' at least in the context of higher education to support the use of racial considerations in furthering that interest.")).

[22]*United States v. Paradise*, 480 U.S. 149, 171 (1987).

next question to be, "Was the law school's 1992 admissions process, with one TI range for blacks, another for Mexican Americans, and a third for other races, narrowly tailored to achieve diversity?" I conclude that it was not. Focusing as it does on blacks and Mexican Americans only, the law school's 1992 admissions process misconceived the concept of diversity, as did California's in the view of Justice Powell: Diversity which furthers a compelling state interest "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[23]

When the selective race-based preferences of the law school's 1992 admissions process are evaluated under Justice Powell's broad, multi- faceted concept of diversity, that process fails to satisfy the requirements of the Constitution.[24] The law school purported to accomplish diversity by ensuring an increase in the numbers of only blacks and Mexican Americans in each incoming class to produce percentages–virtually indistinguishable from

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[23]*Bakke*, 438 U.S. at 316. In the portion of his opinion that addresses narrow tailoring, Justice Powell concluded that California's admission process misconceived the concept of "diversity." *Id.* California's preferential program, focused as it was *solely* on aiding minority applicants, was not necessary to attain diversity. *Id.*

[24]In the instant litigation, the law school created its own Catch-22 by advancing two putative compelling interests that ultimately proved to produce so much internal tension as to damage if not fatally wound each other. Under the banner of prior discrimination, Texas had no choice but to single out blacks and Mexican-Americans, for those two racial groups were the only ones of which there is any evidence whatsoever of de facto or de jure racial discrimination by the State of Texas in the history of its educational system. But, by favoring just those two groups and doing so with a virtual quota system for affirmative action in admissions, the law school estops itself from proving that its plan to achieve diversity is ingenuous, much less narrowly tailored.

quotas–of approximately five and ten percent, respectively. Yet blacks and Mexican Americans are but two among any number of racial or ethnic groups that could and presumably should contribute to genuine diversity. By singling out only those two ethnic groups, the initial stage of the law school's 1992 admissions process ignored altogether non-Mexican Hispanic Americans, Asian Americans, and Native Americans, to name but a few.

In this light, the limited racial effects of the law school's preferential admissions process, targeting exclusively blacks and Mexican Americans, more closely resembles a set aside or quota system for those two disadvantaged minorities than it does an academic admissions program narrowly tailored to achieve true diversity. I concede that the law school's 1992 admissions process would increase the percentages of black faces and brown faces in that year's entering class. But facial diversity is not true diversity, and a system thus conceived and implemented simply is not narrowly tailored to achieve diversity.

Accordingly, I would find that the law school's race-based 1992 admissions process was not narrowly tailored to achieve diversity and hold it constitutionally invalid on that basis. By so doing I would avoid the largely uncharted waters of a compelling interest analysis. Although I join my colleagues of the panel in their holding that the law school's 1992 admissions process fails to pass strict scrutiny,[25] on the question of diversity I follow the solitary path of narrow tailoring rather than the primrose path of compelling interest to reach our common holding.

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[25]I also concur in my colleagues' conclusion that intervention by the two black student organizations is not mandated, and do so for the same reasons.

II

REMEDY

Before concluding, I am compelled to add a few words about the panel opinion's "commentary" regarding the remedy to be imposed by the district court on remand. Without employing the express language of injunction or affixing that label to its holding, the panel opinion's discussion of the remedy on remand is "strongly suggestive" and has all of the substantive earmarks of an injunction:

> [The] plaintiffs have shown that it is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction to the effect that it may not do so for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.
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> It is not necessary, however, for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion. If an injunction should be needed in the future, the district court, in its discretion, can consider its parameters without our assistance. Accordingly, we leave intact that court's refusal to enter an injunction.[26]

Essentially, the substance of the quoted portion of the panel opinion constitutes a de facto injunction–telling the district court precisely what to tell the law school that it can and can't do–albeit without the use of the word injunction. To me, if "it" has feathers,

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[26]Panel Opn. at 59-60.

swims, waddles, and quacks like a duck, it is a duck; and I find such an "un-injunction" inappropriate. If instead we were simply to reverse and remand on the violation issue, we would stop short of finding de novo that the law school had violated these four plaintiffs' equal protection rights. It seems unavoidable to me that until the district court determines that there has been a violation, a remedy cannot be fashioned and should not be the subject of appellate speculation.[27]

The district court denied the plaintiffs injunctive relief, but only after assigning the burden of proof to the wrong party.[28] No member of this panel questions that, in the initial stanza of the burden-shifting minuet of *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*,[29] the plaintiffs met their burden. Once the plaintiffs did that, the burden should have shifted to the law school. Instead, the district court left it with the plaintiffs and concluded that they had failed to carry the ultimate burden. The district court's failure to shift the burden to the law school, and the conclusion of that court which followed, were errors. Accordingly, like my colleagues of the panel, I would remand the case to the district court with instructions to relieve the plaintiffs of the misplaced burden while affording the law school the opportunity to prove that the prima facie violation established by the plaintiffs was essentially harmless. But it seems clear to me that this is where our analysis

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[27]*Hay v. Waldron*, 834 F.2d 481, 484 (5th Cir. 1987) (The law is well-settled that the grant or denial of injunctive relief rests in the sound discretion of the *district court*); *Lubbock Civ. Lib. Union v. Lubbock Ind. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

[28]Panel Opn. at 55 ("We conclude that the *Mt. Healthy* methodology is appropriate in the instant case."). On this point, I agree with the panel majority that the *Mt. Healthy* burden-shifting minuet should apply.

[29]429 U.S. 274, 284 (1977).

should end. As a result, I depart from the "commentary" in the panel opinion regarding the precise elements of the remedy to be fashioned by the district court if it should conclude on remand that the law school shall have failed to bear its burden.

III

CONCLUSION

I end where I began: We should only decide the issues necessarily before this court, and then only on the narrowest bases upon which our decision can rest. This is not a class action; nothing is before us here save the claims of four individual plaintiffs. These four individual plaintiffs properly challenge only the admissions process employed by the law school in 1992--not the admissions process that was in place and employed in 1995, not the admissions process that is being employed in 1996, and not the admissions process to be applied in any future years. In sum, I would remand, and in the process I would take care not to eviscerate the discretion of the district court with excessive "commentary" or implicit directions on the precise nature of the remedy that must ensue. Rather, my remand would simply instruct the district court to apply the correct burden-shifting process articulated in *Mt. Healthy,* then see how the law school deals with it. That way, if the *Mt. Healthy* application should demonstrate the need for a remedy, the district court would be free to fashion the appropriate relief--including injunctive if necessary--for those among the individual plaintiffs whose individual cases warrant it. For this court to do anything beyond that impresses me as overreaching. Thus I concur in the judgment of the panel opinion but, as to its conclusion on the issue of strict scrutiny and its gloss on the order of remand, I disagree for the reasons I have stated and therefore concur specially.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50569

CHERYL J. HOPWOOD, et al., Plaintiffs-Appellees,

v.

STATE OF TEXAS, et al., Defendants-Appellees,

v.

THURGOOD MARSHALL LEGAL SOCIETY and BLACK PRE-LAW ASSOCIATION, Movants-Appellants.

Douglas CARVELL, et al., Plaintiffs-Appellees,

v.

STATE OF TEXAS, et al., Defendants-Appellees,

v.

THURGOOD MARSHALL LEGAL SOCIETY and BLACK PRE-LAW ASSOCIATION, Movants-Appellants.

No. 94-50569

Cheryl J. HOPWOOD, et al., Plaintiffs,

CHERYL J. HOPWOOD, et al., Plaintiffs-Appellants,

v.

STATE OF TEXAS, et al., Defendants-Appellees.

Douglas Carvell, et al., Plaintiffs,

DOUGLAS CARVELL, Plaintiff-Appellant,

v.

STATE OF TEXAS, et al., Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

Before SMITH, WIENER and DeMOSS, Circuit Judges.[1]

PER CURIAM:

In No. 94-50569, treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of the members of the court, and a majority of the judges in regular active service not having voted in favor (*see* Fed.R.App.P. 35 and 5th Cir. R. 35), the suggestion for rehearing en banc is DENIED.

In No. 94-50664, the court having been polled, at the request of one of the members of the court, on the reconsideration of this cause en banc, and a majority of the judges in regular active service not having voted in favor, rehearing en banc is DENIED.

A dissent from the denial of rehearing en banc is forthcoming and is to be published.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith [April 4, 1996]
UNITED STATES CIRCUIT JUDGE

POLITZ, Chief Judge, and KING, WIENER, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges, dissenting from failure to grant rehearing en banc.

> Soon after the founding of the Republic, the Supreme Court indicated that the power of judicial review should be exercised reluctantly, only because it is essential to the decision of the case before a federal court and because the

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[1]Judge Emilio M. Garza did not participate in this decision.

Constitution and the laws of the United States, as the "Supreme law of the Land," require it.[1]

This case was brought by four individual plaintiffs (not a class of plaintiffs) who were denied admission to the University of Texas Law School (Law School) in 1992, claiming that the Law School's admission process in 1992 violated the Fourteenth Amendment by giving race-based preferences exclusively to blacks and Mexican Americans.[2] In resolving the case presented by these four plaintiffs, the panel opinion directed the Law School not to use race as a factor in the admissions process at all.[3] In so doing, the opinion goes out of its way to break ground that the Supreme Court itself has been careful to avoid and purports to overrule a Supreme Court decision, namely, *Regents of the University of California v. Bakke*.[4] The radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation. A case of such monumental import demands the attention of more than a divided panel. It should have the attention of every active judge on this court. We respectfully but emphatically dissent from the denial of rehearing en banc.

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[1]*Baker v. Wade*, 769 F.2d 289, 298 (5th Cir. 1985) (Goldberg, J., dissenting) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 4 L. Ed. 97 (1816)).

[2]The Law School no longer employs the system that was in place for 1992.

[3]Judge Smith wrote the opinion for the panel, and Judge DeMoss joined that opinion in full. Judge Wiener, who wrote separately, did not join the panel opinion in this conclusion.

[4]438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

For reasons that have not been communicated to this court, and upon which we can only speculate, neither the plaintiffs nor the defendants have sought rehearing en banc. It would appear that in this case, some of our colleagues may have embraced the rationale that, when sophisticated litigants represented by capable lawyers elect not to seek rehearing en banc, it is not our place to take any action. Our customary practice, however, does not support this position. Indeed, not infrequently we propose rehearing en banc on our own motion, before the parties have requested that we do so. We reject out of hand the notion that we are merely obsequious ciphers, subject to the tactical decisions and strategic maneuvers of the litigants before us. When the occasional case of such far-reaching importance to this court, to public higher education, and to this nation comes down the pike, we have a duty to address it and to do the best possible job that *our whole court* is capable of, regardless of the tactical decisions of the litigants. To decline to rehear a case of this magnitude because the parties have not suggested that we do so bespeaks an abdication of duty--the ducking of a tough question by judges who we know first-hand are made of sterner stuff.

The label "judicial activism" is usually found in the lexicon of those voicing concern about judges whom they perceive to be "liberal," fashioning remedies beyond the scope of what is deemed to be appropriate under the law. Such judicial legislating is generally excoriated as a "bad thing." *Hopwood v. State of Texas*[5] is a text book example of judicial activism. Here, two members of the three-judge panel determined to bar *any* consideration of race in the Law School's admission process. This "injunction" is wholly unnecessary to the disposition of the matter appealed and thus is clearly dictum; yet dictum that is a frontal assault on contrary Supreme Court precedent and thus not the kind of dictum we can

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[5] __F.3d__ (1996 WL 120235) (5th Cir. 1996).

ignore. By tenuously stringing together pieces and shards of recent Supreme Court opinions that have dealt with race in such diverse settings as minority set asides for government contractors, broadcast licenses, redistricting, and the like, the panel creates a gossamer chain which it proffers as a justification for overruling *Bakke*. We are persuaded that this alone makes the instant case not just en banc-worthy but en banc mandatory.

The Supreme Court has left no doubt that as a constitutionally inferior court, we are compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it.[6] We may not reject, dismiss, disregard, or deny Supreme Court precedent, even if, in a particular case, it seems pellucidly clear to litigants, lawyers, and lower court judges alike that, given the opportunity, the Supreme Court would overrule its precedent.

Members of this court have frequently "preached" against such judicial activism. In *Williams v. Whitley*[7] Judge Higginbotham explained the limits placed on appellate courts regarding Supreme Court precedent:

> [A]bsent clear indications from the Supreme Court itself, lower courts should not lightly assume that a prior decision has been overruled sub silentio merely because its reasoning and result appear inconsistent with later cases. As [the district court] pointed out . . . the Court issued a reminder to this effect only a few years ago in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989): "If a precedent of [the Supreme] Court has direct application in a case, yet appears

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[6]*See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

[7]994 F.2d 226, 235 (5th Cir. 1993).

> to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Id.* at 484-85, 109 S. Ct. at 1921-22; see also id. at 486, 109 S. Ct. at 1923 (Brennan, J., dissenting) (describing anticipatory overruling as "an indefensible brand of judicial activism") . . . In these circumstances, *our role as an inferior court counsels restraint, even if the result otherwise appears inescapable.*

In like manner, our colleagues have routinely counseled that judicial restraint is the order of the day, especially in the constitutional context. For example, in *Walton v. Alexander,*[8] Judge Garwood insisted that courts have a duty not to address constitutional issues not necessary to the disposition of an individual case.

> [I]t is settled that courts have a "strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *County Court of Ulster County v. Allen,* 442 U.S. 140, 154, 99 S. Ct. 2213, 2223, 60 L. Ed. 2d 777 (1979). This "responsibility to avoid unnecessary constitutional adjudication" is "a fundamental rule of judicial restraint." *Three Affiliated Tribes v. Wold Engineering,* 467 U.S. 138, 157, 104 S. Ct. 2267, 2279, 81 L. Ed. 2d 113 (1984). All this, of course, applies not only to the Supreme Court but to lower courts as well. *See Bowen v. United States,* 422 U.S. 916, 920, 95 S. Ct. 2569, 2573, 45 L. Ed. 2d 641 (1975).

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[8] 20 F.3d 1350, 1356 (5th Cir. 1994). We cannot but note that a majority of our active judges voted *Walton* en banc to correct the majority's erroneous interpretation of Supreme Court precedent regarding an issue that was not necessary for the resolution of the case.

Variations of this theme can be found in the opinions of many of the judges of this court.[9]

Thus, it seems that this court has trouble practicing what it preaches, at least in this instance. For here, Justice Powell's opinion in *Bakke* made the Supreme Court's disposition precedential.[10] We unequivocally reject the proposition that it does not mandate our

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[9]*See also United States v. Mendiola*, 42 F.3d 259, 260 n.1 (5th Cir. 1994) (Barksdale, J.) ("It goes without saying that we have a strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration."); *Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989) (Smith, J.) ("Principles of judicial restraint dictate that if resolution of an issue effectively dispose of a case, we should resolve the case on that basis without reaching any other issues that might be presented."); *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1175 (5th Cir. 1993) (Jolly, J.) ("The judicial power to adjudicate constitutional questions is reserved for those instances in which it is *necessary* for the vindication of individual rights.") (emphasis added); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (Jones, J., dissenting, joined by Garwood, Smith, Barksdale, and DeMoss, JJ.) ("'The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in [the constitutional] field.'") (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261 (1992)).

[10]In a part V.C. of his opinion, Justice Powell writes,

> In enjoining [the University of California at Davis] from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. *Bakke*, 438 U.S. at 320, 98 S. Ct. at 2763. Justices Brennan, White, Marshall, and Blackmun joined Justice Powell in this holding. *Id.* at 271 n.*, 98 S. Ct. at 2738 n.*.

disposition. The syllogisms tacked together and proffered by the majority opinion as proof that Justice Powell's diversity conclusion is no longer good law do not, under any standards of which we are aware, qualify as an overruling of *Bakke*.[11] To the contrary, direct reference to Justice Powell's diversity analysis documents, supports, and reinforces its continuing validity.[12] Consequently, even if the members of the panel majority were convinced that the Supreme Court is certain to overrule *Bakke*, in the absence of an express overruling, they had no option but to grin, follow *Bakke*, bear it, and patiently await the Supreme Court's reconsideration. Rather than following this universally recognized canon, adhering to our established rules, and applying Supreme Court precedent, the panel charted a path into terra incognita. Judicial self-restraint was the first casualty; it proved to be too burdensome. The teachings proscribing the consideration of constitutional issues unnecessary to the decision soon followed. With these two limitations adroitly set aside, the panel majority apparently considered itself positioned to overrule *Bakke*.

Giving the panel majority the benefit of the doubt, as we are wont to do and should do, and assuming arguendo that *Bakke's* diversity issue had to be addressed in this particular case, would it not have been the more judicious course to have brought our full en banc powers to bear on this difficult, vitally important question? It can hardly be gainsaid that reasonable jurists can and likely will differ on an issue of such magnitude, depth, and importance.

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[11]Lest there be any doubt, we are firmly convinced that, until the Supreme Court expressly overrules *Bakke*, student body diversity *is* a compelling governmental interest for the purposes of strict scrutiny.

[12]*See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286, 106 S. Ct. 1842, 1853, 90 L. Ed. 2d 260 (1986) (O'Connor, J., concurring) (recognizing racial diversity as sufficiently compelling in the context of higher education).

Indeed, this very truism compels giving to the entire court the opportunity to devote to this crucial case its focused consideration. Conceivably, after an en banc rehearing the panel result, its reasoning, and even its dicta, might be embraced by a majority of the en banc court. But that is not the point; even if that unprecedented and, we suggest, impertinent step—a federal circuit court, sitting en banc, purporting to overrule a Supreme Court precedent—were to be taken, it would not be taken until sixteen of the seventeen active judges of this court[13] had an opportunity to consider and participate in the deliberations on this matter fully.

There are many things which a "yea" vote on an en banc poll is not: It is not necessarily a vote against the analysis; it is not necessarily a vote against the result; it is not necessarily a vote against a panel opinion or in favor of a special concurrence or a dissent. It is rather an affirmative statement that, for one or more reasons, a case or an issue is worthy of the time, attention, and efforts of the entire court. *Hopwood* is such a case. Unfortunately, a bare majority of our colleagues have joined hands to deny this storied court the opportunity to consider this case en banc.

The majority of the panel overruled *Bakke*, wrote far too broadly, and spoke a plethora of unfortunate dicta. That was not their prerogative, yet this court declined to reconsider *Hopwood* en banc. From that decision we must, perforce, dissent.

STEWART, Circuit Judge, dissenting from failure to grant rehearing en banc.

I wholeheartedly concur in the dissent to the denial of en banc rehearing. I write separately to underscore the lack of historical perspective and sensitivity in both the panel majority's opinion and the vote not to consider this case en banc.

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[13]Judge Emilio M. Garza, our seventeenth active judge, recused himself from the outset.

That it is the University of Texas School of Law's admissions policy at issue is a fact whose significance has not been lost on any of us. In 1946, this very school denied admission to Heman Marion Sweatt because he was black, prompting him to sue the University. Sweatt's real difficulties began fifty years before when the United States Supreme Court scripted one of this nation's most evil conceits in *Plessy v. Ferguson*, 163 U.S. 537 (1896), declaring "separate but equal" treatment of black Americans constitutional. *Plessy* was no more than a license for continued racial discrimination. However, in 1950 the Supreme Court held that excluding Sweatt on account of his race violated the Equal Protection Clause of the Fourteenth Amendment. *Sweatt v. Painter*, 339 U.S. 629 (1950).[1]

History, in its characteristic irony, takes this court to that hallowed ground of civil rights jurisprudence to assess the University's effort to encourage minority enrollment and counter its legacy of segregation. It is an unfortunate, further irony that the panel majority opinion should so overreach in its decision. In Sweatt's case, the Supreme Court explicitly adhered to the "principle of deciding constitutional questions only in the context of the particular case before the Court," drawing its decision "as narrowly as possible." *Id.* at 631, 70 S. Ct. at 849 (citing *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947)). If there ever were a time to end legalized segregation, that was the time. The Court was in a position to paint with a broad brush and eliminate the very regime which denied civil rights to Sweatt and other blacks. Chief Justice Vinson's opinion

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[1]When a court ordered the State to provide a law school for blacks, Texas created a "makeshift law school that had no permanent staff, no library staff, no facilities, and was not accredited." *Hopwood v. State of Texas*, 861 F. Supp. 551, 555 (1994). This "law school" consisted of 3 rooms in a basement and had two professors. Paul Butler, *Affirmative Action Admissions*, Dallas Morning News, April 7, 1996, at 1J.

for the Court, however, resisted calls to wax on "[b]roader issues . . . urged for our consideration." *Id.*

The panel majority in our case displayed no such discipline, instead taking the unauthorized liberty of deciding the appropriateness of diversity as an admissions criterion, not just the merits of the instant admissions policy. Constitutional interpretation is a sensitive project. Limiting ourselves to the facts before the court keeps the process measured--it is a traditional check which respects the need to calibrate rights and interests carefully. Given the sensitivity of constitutional interpretation, the panel majority's decision disrespects the importance of the facts. Refusing to correct this travesty en banc is a grave error.

As to the request to intervene, what class of persons is more qualified to adduce the evidence of the present effects of past discrimination than current and prospective black law students? Reading *Sweatt* as a benchmark decision marking the end of *de jure* segregation is akin to shelving Trotsky's *The History of the Russian Revolution* upon reading only the preface. Just as those initial pages fail to give a true rendition of the entire work, so too does *Sweatt* give only a superficial understanding of the racism it hardly addressed. A year after the Supreme Court ordered that Sweatt be admitted, he left the law school" without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings." *Hopwood v. State of Texas,* 861 F. Supp. 551, 555 (1994). Furthermore, "the record reflects that during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students." *Id.* It was not until 1983 that Texas even agreed, after years of threats of federal action, to an acceptable plan to desegregate its higher education system. In 1987 and again in 1994, the Department of Education instructed Texas to maintain its plan. To this day, Texas's higher education system still

has not been declared in compliance with Title VI and the Fourteenth Amendment. *Id.* at 556-57.

"The life of the law," Justice Oliver Wendell Holmes observed, "is not logic, but experience." To divorce the time in which it was legally possible for Sweatt to attend the Law School from the reality he experienced there is to ignore the very insidiousness of racial discrimination. It was the vestiges of that discrimination which, far from being destroyed, thrived and drove Sweatt out of the Law School. We act no less callously now in pretermitting the consideration of that legacy of discrimination by denying rehearing.

For all these reasons and those expressed in the collective dissent, I vehemently disagree with our court's decision not to rehear this case en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHERYL J. HOPWOOD, DOUGLAS W. CARVELL, KENNETH R. ELLIOTT, and DAVID A. ROGERS,
Plaintiffs,

VS.

THE STATE OF TEXAS; UNIVERSITY OF TEXAS BOARD OF REGENTS; BERNARD RAPOPORT, ELLEN C. TEMPLE, LOWELL H. LEBERMANN, JR., ROBERT J. CRUIKSHANK, THOMAS O. HICKS, ZAN W. HOLMES, TOM LOEFFLER, MARIO E. RAMIREZ, and MARTHA E. SMILEY, as members of the Board, in their official capacities; UNIVERSITY OF TEXAS AT AUSTIN; ROBERT M. BERDAHL, President of the University of Texas at Austin in his official capacity; UNIVERSITY OF TEXAS SCHOOL OF LAW; MARK G. YUDOF, Dean of the University of Texas School of Law in his official capacity; STANLEY M. JOHANSON, Professor of Law in his official capacity,
Defendants.

NO. A 92 CA 563 SS

MEMORANDUM OPINION

This is the continuing case of four white students who contend they were denied admission to the University of Texas School of Law in 1992 as a result of procedures granting preferences in admission to black and Mexican-American applicants.

I.

On September 29, 1992, the plaintiffs Cheryl J. Hopwood, Douglas W. Carvell, Kenneth R. Elliot, and David A. Rogers filed

suit under 42 U.S.C. §§ 1981 and 1983 (West 1994) and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (West 1994) ("Title VI"),[1] against the defendants the State of Texas, the University of Texas Board of Regents, the University of Texas, the University of Texas School of Law ("the law school"), and various University of Texas officials in their official capacities.[2] The plaintiffs sought injunctive and declaratory relief, as well as compensatory and punitive damages. The Court held an eight-day bench trial in the case in May 1994.

On August 19, 1994, the Court issued its memorandum opinion

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[1]Sections 1981 and 1983 are the vehicles by which the plaintiffs assert violations of the Equal Protection Clause of the Fourteenth Amendment. Title VI provides in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

[2]Many of the University of Texas officials sued by the plaintiffs in 1992 are no longer associated with the University of Texas system and/or the law school. Defendants Bernard Rapopart, Ellen C. Temple, Lowell H. Leberman, Jr., Robert Cruikshank, Thomas O. Hicks, Zan W. Holmes, Jr., Tom Loeffler, Mario E. Ramirez, and Martha E. Smiley were sued in their official capacities as members of the University of Texas Board of Regents. Defendant Robert M. Berdahl was sued in his official capacity as President of the University of Texas at Austin; the current interim President is Peter T. Flawn. Defendant Mark Yudof was sued in his official capacity as the Dean of the University of Texas School of Law; M. Michael Sharlot, an Assistant Dean of the law school in 1992, has since replaced Yudof as Dean. Defendant Stanley M. Johanson was sued in his official capacity as Chair of the University of Texas School of Law Admissions Committee and remains in that capacity to this date.

in *Hopwood v. State of Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) ("*Hopwood I*"). In deference to controlling Supreme Court precedent, the Court declined to declare the law school's use of racial preferences in its admissions system unconstitutional per se, *see id.* at 553-54, and instead applied strict scrutiny to the law school's admissions system, *see id.* at 568-69. Relying primarily on Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978), the Court found that the law school's use of racial preferences for the purpose of achieving a diverse student body served a compelling state interest under the Fourteenth Amendment. *See Hopwood I*, 861 F. Supp. at 569-571. Additionally, the Court found that the remedial nature of the admissions process, in which racial classifications were used as a means of overcoming the present effects of past race discrimination, served a compelling governmental interest. *See id.* at 571-73. The Court ultimately concluded, however, that the law school's use of separate admissions procedures for minorities and nonminorities[3] was not narrowly tailored to achieve those compelling interests because the process prevented any meaningful comparative evaluation among applicants of different races. *See id.* at 573-579.

The Court therefore entered declaratory judgment that the law school's 1992 admissions procedures violated the Fourteenth Amendment. *See id.* at 582.

The Court then considered whether any of the four plaintiffs was denied admission in 1992 as a result of the constitutionally

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[3]The 1992 admissions procedures favored only black and Mexican-American applicants. Other minority groups, including Hispanics not of Mexican-American descent, were not granted preferences in admission. In this opinion, the Court loosely uses the term "minority" to refer to blacks and Mexican-Americans; the term "nonminority" is used to refer to whites and non-preferred minorities.

impermissible method in which the law school considered race in its admissions procedures. In determining which party bore the burden of persuasion on that issue, the Court adopted a burden-shifting scheme similar to that used in employment discrimination cases brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (West 1994) ("Title VII"), and placed the ultimate burden of persuasion on the plaintiffs.[4] *See id.* at 579- 80. The Court found that the plaintiffs failed to establish by a preponderance of the evidence that they would have been offered admission to the law school under a constitutional admissions process. *See id.* at 580-82. The Court therefore declined to award the plaintiffs injunctive relief (that is, an

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[4]In the Title VII arena, The Supreme Court has developed a burden-shifting scheme to be used when there is not direct evidence of an employer's racial animus. *See, e.g., Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). The employee bears the initial burden of establishing a *prima facie* case of discrimination. *See Burdine*, 450 U.S. at 253-54; 101 S. Ct. at 1094. If successful, the burden of *production* shifts to the defendant to establish legitimate, nondiscriminatory grounds for the adverse employment action. *See id.* at 254-55; 101 S. Ct. at 1094-95. If such grounds are shown, the burden shifts back to the employee to establish that the reasons proffered by the defendant are merely pretext for unlawful discrimination. *See id.* at 255-56; 101 S. Ct. at 1095. The burden of *persuasion* remains on the employee at all times. *See id.* at 253; 101 S. Ct. at 1093. In this case, the Court held that the plaintiffs established a *prima facie* case of discrimination by proving that the 1992 admissions process was constitutionally flawed. *See Hopwood I*, 861 F. Supp. at 580. The plaintiffs failed to persuade the Court, however, that the law school's proffered reasons for the plaintiffs' non-admission were pretextual. *See id.* at 581-82.

immediate order of admission) or compensatory damages.[5] *See id.* at 582-83. Furthermore, given the undisputed remedial goals of the admissions program, as well as the fact that the law school adopted the program in a good faith effort to comply with federal guidelines under Title VI, the Court declined to issue an award of punitive damages. *See id.* at 583. Finally, because the law school had substantially modified its admissions procedures by the end of the trial to provide for individual comparison among minority and nonminority applicants (thereby remedying the infirmity identified by the Court in its opinion), the Court declined to issue any permanent injunctive relief against the law school. *See id.* at 582.

A three-member panel of the Fifth Circuit Court of Appeals reversed and remanded the Court's decision in part in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, — U.S. — 116 S. Ct. 2581 (1996) ("*Hopwood II* ").[6] The Fifth Circuit declared that the law school's use of racial preferences served no compelling state interests under the Fourteenth Amendment.[7] *See id.* at 941-55. The divided Fifth Circuit panel therefore directed the law school not to use race as a factor in admissions, although it declined to order any permanent injunctive relief to that effect. *See id.* at 958.

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[5]In view of the unequal treatment to which the plaintiffs were subjected, however, the Court granted nominal damages in the amount of one dollar to each plaintiff and allowed the plaintiffs to reapply to the law school in 1995 without incurring any administrative costs or fees. *See id.* at 582-83.

[6]Over the strenuous and critical objections of Chief Judge Politz and Circuit Judges King, Weiner, Benavides, Stewart, Parker, and Dennis, the Fifth Circuit declined to reconsider the case *en banc*. *See Hopwood v. State of Texas*, 84 F.3d 720 (5th Cir. 1996).

[7]Finding no compelling state interest, the Fifth Circuit did not reach the second inquiry of whether the affirmative action program was narrowly tailored. *See id.* at 955.

Furthermore, the Fifth Circuit disagreed with the Court's allocation of the burden of proof on the issue of causation--whether any of the four plaintiffs would have been admitted to the law school under a constitutional system. Using the burden-shifting scheme of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, (1977), the Fifth Circuit determined the law school bore the burden of proof on that issue because the plaintiffs had successfully established the unconstitutionality of the admissions system. *See Hopwood II*, 78 F.3d at 955-57.

On remand, the Fifth Circuit directed the Court to reconsider two issues. First, the panel directed the Court to apply the proper burden and to reevaluate whether any of the four plaintiffs would have been admitted to the law school in the absence of admissions procedures which took into account an applicant's race or ethnicity. Second, the Fifth Circuit instructed the Court to "revisit" the issue of damages in the event the law school fails to meet its burden: "In the event that the law school is unable to show (by a preponderance of the evidence) that a respective plaintiff would not have been admitted to the law school under a constitutional admissions system, the court is to award to that plaintiff any equitable and/or monetary relief it deems appropriate."[8] *Id.* at 957

In accordance with the Fifth Circuit's instructions on remand, this case was tried before the Court on March 31 and April 2, 3, and 7, 1997. Having carefully considered the evidence presented at both trials and the arguments and briefing of counsel, the Court finds the law school has proved by a preponderance of the evidence that none of the plaintiffs would have been admitted to the law school under a constitutional admissions system. In the event any of the plaintiffs successfully appeals that decision, the Court makes

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[8]The Court need not reconsider the issue of punitive damages, as the Fifth Circuit upheld the Court's determination that punitive damages were inappropriate in this case. *See id.* at 959.

several alternative factual findings and legal conclusions regarding the issue of damages. Finally, the Court enters its findings of fact and conclusions of law regarding the attorneys' fees to which the plaintiffs are entitled as prevailing parties under 42 U.S.C. § 1988 (West 1994).

II.

The admissions process employed by the law school in 1992 and the plaintiffs' qualifications for admission are summarized here for the convenience of the reader and to provide a context for the opinions of the defendants' expert on causation, Professor Olin Guy Wellborn, III.[9] In 1992, the law school received 4,494 applications for admission to fill approximately 500 available seats.[10] *See Hopwood I*, 861 F. Supp. at 563; *Hopwood II*, 78 F.3d at 935 n.2. Given the rather large volume of applications it receives, the law school devised and for several decades has used an administrative procedure by which applicants are categorized according to their Texas Index ("TI") score. An applicant's TI score is calculated by the Law School Data Assembly Service ("LSDAS"). It is a composite number reflecting both the applicant's grade point average ("GPA") and score on the Law School Aptitude Test

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[9]The 1992 admissions procedures and the evolution of the law school's admissions procedures since the 1960s are explained in greater detail in the Court's first opinion, *see Hopwood I*, 861 F. Supp. at 557-563, as are the plaintiffs' qualifications for admission to the law school, *see id.* at 564-567.

[10]Slightly less than half of the applications the law school received were submitted by Texas residents. *See Hopwood I*, 861 F. Supp. at 561 n.22. In 1992, the University of Texas Board of Regents required an entering law school class of at least 500 students, and Texas law mandated that at least 85% of the entering class be Texas residents (the latter figure has since decreased to 80%). *See Hopwood I*, 861 F. Supp. at 563; *Hopwood II*, 78 F.3d at 935 n.2

("LSAT"), and it is generally considered a rough predictor of one's probability of success in law school. *See Hopwood I*, 861 F. Supp. at 557 n.9; *Hopwood II*, 78 F.3d at 935 & n.1. In 1992, the law school placed each applicant, as dictated by his or her TI score, into one of the following three categories: presumptive admit, presumptive deny, and the discretionary zone. See *Hopwood I*, 861 F. Supp. at 558; *Hopwood II*, 78 F.3d at 935.

The admissions committee in 1992 comprised nine professors, two assistant deans, and four students. *Hopwood I*, 861 F. Supp. at 560. Three members of the admissions committee, Professor Stanley Johanson and Assistant Deans Susana Aleman and Laquita Hamilton, formed a subcommittee to review the files of minority applicants.[11] *See id.* As chair of the admissions committee, Johanson had the responsibility of setting the presumptive admission and presumptive denial lines throughout the admissions process.[12] *See id.* He set the first of several presumptive admission lines in late January 1992 and began extending offers at that time to ensure that the most desirable applicants received offers as quickly as possible. *See id.* at 561. Because the law school application deadline was not until February 1, 1992—and thus the quality of the entire applicant pool had not yet been defined—Johanson set this initial presumptive admit line relatively

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[11]Although members of the minority subcommittee were supposed to review nonminority files as well, testimony from the first trial established that Aleman did not review any nonminority files in 1992. *See Hopwood I*, 861 F. Supp. at 562.

[12]Because of the limited number of seats available for nonresidents, Johanson set the presumptive admission and denial lines at a higher level for nonresidents than for residents. *See Hopwood I*, 861 F. Supp. at 561 n.22.

high.[13] *See id.* at 560-61. Johanson then reviewed the files within the presumptive admission category to determine whether the applicant's TI score was inflated by high grades in a noncompetitive university and/or major, or whether there was some other questionable aspect to the applicant's file. *See id.* at 561. "Those applications with a high TI reflecting a high LSAT and high grades in a rigorous major at a leading undergraduate institution were admitted by Johanson, who had unilateral authority to admit any applicant in this category without further consultation with the full admissions committee." *Hopwood I*, 861 F. Supp. at 561. Questionable files (roughly five to ten percent of all presumptive admit files) were placed in the discretionary zone for further review. *See Hopwood II*, 78 F.3d at 936.

Essentially the same procedure occurred at the other end of the spectrum. Johanson set the initial presumptive denial line, and one or two members of the admissions committee then reviewed all of the applications in this category. *See Hopwood I*, 861 F. Supp. at 561. Applicants with TI scores that understated their competitive standing relative to the rest of the pool were upgraded to the discretionary zone. *See id.* Johanson testified at the first trial that he could not recall the number of presumptive deny files that were upgraded in 1992, although generally twenty to forty files were moved to the discretionary zone as a result of this review. *See id.* The discretionary zone, therefore, comprised "those applicants whose TIs fell between the presumptive denial line and the presumptive admission line, those applicants who Johanson had moved down from the presumptive admission category, and those applicants who reviewers had moved up from the presumptive

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[13]"Johanson's setting of these scores was a process that evolved over the course of the admissions process based on the pool of applicants, the number of offers, and the number of acceptances. Initially, the numbers were set high and lowered as the yield from offers and composition of the entering class began to develop." *Hopwood I*, 861 F. upp. at 561 n.24.

denial category." *Id.*

The law school's admissions procedures treated minority applicants differently in two ways. First, the presumptive admissions and denial lines were lower for minorities than they were for nonminorities.[14] By March 1992, the presumptive admission line for resident nonminorities was lowered from 202 to 199, while the presumptive denial line was set at 192. *See id.* at 561-62. For Mexican-Americans, however, the presumptive admission line was lowered from 196 to 189, and for blacks this line was lowered from 192 to 189. For both minority groups, the presumptive denial line was 179. *See id.* at 562; *Hopwood II*, 78 F.3d at 936. Second, minority and nonminority files within their respective discretionary zones were segregated and subjected to different procedures of review. The minority subcommittee was to meet as a group to review and discuss all the minority files. Although the minority subcommittee provided the full admissions committee with summaries of the files they considered to be good candidates, the subcommittee's admissions decisions were virtually final. *See Hopwood I*, 861 F. Supp. at 562. Nonminority applications, on the other hand, were separated into weighted stacks of thirty files, and each stack was reviewed by a random three-member panel of the admissions committee.[15] *See id.* Rather than review the piles as a group, each member of the panel conducted an independent and secret screening of the stack of thirty

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[14]During the preliminary review process in January 1992, however, Johanson reviewed minority and nonminority files together. *See Hopwood I*, 861 F. Supp. at 561 n.23.

[15]The law school recently discarded the piles-of-thirty approach in favor of a smaller admissions committee comprising three members. All three members of the admissions committee review each application. *See Wellborn*, vol. 1 at 51, 246-47. (All references to the trial transcript in this opinion are from the second trial unless otherwise noted.)

files and voted to offer admission to an average of nine applicants from the stack.[16] *See id.* Johanson then tallied the number of votes each applicant received within his or her stack of thirty. Applicants receiving two or three votes were offered admission, applicants receiving no votes were immediately denied admission, and applicants receiving one vote were offered a position on the waiting list. *See id.*

The plaintiffs were each reviewed by a three-member panel in the nonminority discretionary zone screening, and all were considered Texas residents by the admissions committee. Hopwood received an associate's degree in accounting from Montgomery County Community College in 1984, and she earned a bachelor's degree in accounting from California State University-Sacramento in 1988. She graduated with a GPA of 3.80 and had an LSAT score in the 83rd percentile.[17] *See Hopwood I*, 861 F. Supp. at 564; P-145. Although Hopwood had a TI score of 199 which, by March 1992, placed her just within the presumptive admit line, Johanson concluded her GPA overstated her educational background and therefore downgraded her file to the discretionary zone. *See id.* at 564. Carvell, Elliot and Rogers each had a TI score

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[16]There were 18 stacks in the nonminority discretionary zone. Seventeen stacks contained 30 application files; the remaining stack comprised only 16 files. Each committee member was required to screen 5 stacks. *See Hopwood I*, 861 F. Supp. at 562 n.26 & 27.

[17]In 1992, LSDAS was in the process of changing the LSAT scoring system from a two-digit system to a three-digit system. See *Hopwood I*, 861 F. Supp. at 561 n.25; *Hopwood II*, 78 F.3d at 936 n. 5. For sake of consistency with the Fifth Circuit decision, the TI scores reported in this opinion reflect only the three-digit scoring system. *See Hopwood II*, 78 F.3d at 936 n.5. With respect to LSAT scores, the Court refers to the applicants' percentile rank on the exam rather than to the applicant's two- or three-digit score in order to draw a more accurate comparison among the applicants.

of 197. Carvell attended Hendrix College in Conway, Arkansas, where he graduated with a bachelor's degree in political science in 1991. He had a GPA of 3.28 and an average LSAT score in the 76th percentile.[18] *See id.* at 566-67; P-151. Elliot graduated with a bachelor's degree in accounting from the University of Texas in 1984, where he earned a GPA of 2.98, and he scored in the 95th percentile on the LSAT. Following graduation, he became a certified public accountant ("CPA") and worked for various state agencies in Texas as an auditor or examiner. *See id.* at 565-66, P-153. Rogers earned an undergraduate degree in professional writing from the University of Houston-Downtown in 1990. In the early to mid-1980s, he attended the University of Texas, where he was placed on academic probation once and dismissed twice for poor scholastic performance. He had a cumulative GPA of 3.13 and an LSAT score in the 94th percentile. Rogers earned a master's degree in professional writing from the University of Southern California in 1992. *See Hopwood I*, 861 F. Supp. at 567; P-171. By contrast, the median GPA for white students in the 1992 entering class was 3.56, and the median LSAT score was in the 91st percentile. *See Hopwood II*, 78 F.3d at 936-37 & n.7. For all students (minority and nonminority) in the 1992 entering class, the median GPA was 3.52, while the median LSAT score was in the 89th percentile. *See id.*

Hopwood and Carvell each received one vote in screening, were offered positions on the waiting list, and were eventually denied admission to the law school in Spring 1992. *See Hopwood I*, 861

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[18]Carvell took the LSAT twice, once under the two-digit system and again under the three-digit system. He scored in the 61st percentile on his first exam and in the 91st percentile on his second exam. P-151. Carvell's TI score of 197 only reflects his higher LSAT score in the 91st percentile. *See Wellborn*, vol. 1 at 71. The Court's first opinion, which indicates that Carvell's TI score of 197 reflects his averaged LSAT score, *see Hopwood I*, 861 F. Supp. at 566 n.47, is in error.

F. Supp. at 564-66. Elliot and Rogers received no votes in screening and were immediately notified of their rejection in April 1992.[19] *See id.* at 565-67. By the end of the admissions process, the law school had extended offers to 936 resident and nonresident applicants. *See id.* at 563 n.32. Of the 637 offers extended to Texas residents, 96 went to blacks and Mexican-Americans and 541 went to whites and nonpreferred minorities. *See* D-519. The plaintiffs were therefore among over 3,500 individuals, including approximately 1,500 Texas residents, who were denied admission to the law school in 1992.

III.

The Fifth Circuit characterizes *Mt. Healthy* as devising "a test of 'causation' that place[s] the burden of proving no harm on the defendant" when the plaintiff establishes the defendant intended to discriminate or otherwise acted unconstitutionally. *See Hopwood II*, 78 F.3d at 956. The Court respectfully suggests that the *Mt. Healthy* framework is inapplicable to this case and the plaintiffs should retain the burden of proof. In *Mt. Healthy*, an untenured teacher claimed a school board's decision not to rehire him was the result of the comments he had made on a radio show. *See Mt. Healthy*, 429 U.S. at 281-3, 97 S. Ct. at 573-74. Although the board conceded the comments had influenced its decision not to rehire the teacher, the board asserted the teacher would not have been rehired in any event because of legitimate, nondiscriminatory reasons unrelated to the exercise of his First Amendment rights.

The district court found that the teacher's comments were protected by the First Amendment and that they played a "substantial part" in the board's decision not to rehire him. *See id.* at 283, 97 S. Ct. at 574. The district court ordered the teacher's

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[19]As explained in further detail in Part III(B) *infra*, the law school reconsidered Elliot's application for admission following Elliot's initial rejection in April 1992.

reinstatement, which ultimately resulted in his receiving tenure, and the circuit court affirmed the trial court's findings and conclusions. *See id.* at 283-86, 97 S. Ct. at 574-75. *Mt. Healthy* was unique in that it presented the Supreme Court with a "mixed motives" case in which the governmental entity admitted it considered both legitimate and illegitimate factors in reaching its employment decision, in contrast to the typical "pretext" case in which the only issue is whether *any* improper or discriminatory motive exists.[20] Therefore, the question before the Supreme Court was whether the plaintiff had necessarily shown a constitutional violation justifying remedial action simply by establishing that the protected conduct was a "substantial" factor in the board's decision not to rehire him.

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[20]In his concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 1795, (1989), a case in which the Supreme Court applied the *Mt. Healthy* burden-shifting scheme to a Title VII sex discrimination case, Justice White explained the distinction between a "mixed-motives" and "pretext" case:

> The Court has made it clear that 'mixed-motives' cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, the issue is whether either illegal or legal motives, but not both, were the true motives behind the decision. In mixed-motives cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate....[T]he showing required by *Mt. Healthy* does not improperly shift from the plaintiff the ultimate burden of persuasion on whether the defendant intentionally discriminated against him or her.

Id. at 260, 109 S. Ct. at 1796 (citations and quotations omitted); *see also Holo-Krome Co. v. N.L.R.B.*, 954 F.2d 108, 110 (2nd Cir. 1992) ("[P]retext analysis determines what the true motivation actually was; dual motivation analysis determines what the employer's conduct would have been if the improper motivation had not been present.").

See id. at 285, 97 S. Ct. at 575.

The Supreme Court answered that question in the negative. The Supreme Court reasoned that allowing a plaintiff to recover under those circumstances might "place the employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," because it would require holding the defendant liable even though the same employment decision would have been made for entirely legitimate reasons. *Id.* In response to this dilemma, the Supreme Court devised a burden-shifting framework in which the plaintiff initially bears the burden of proving that the constitutionally protected conduct was a "substantial" or "motivating" factor behind the employer's discriminatory action. *See id.* at 287, 97 S. Ct. at 576; *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270 n.21, 97 S. Ct. 555, 566 n.21, (1977) (characterizing the plaintiff's burden as a "required threshold showing"). Only after the plaintiff makes this showing does the burden then shift to the defendant to prove that the violation was "largely harmless." *See Hopwood II*, 78 F.3d at 957. Therefore, unlike the *McDonnell Douglas* framework used in Title VII pretext cases (in which the burden of persuasion remains on the plaintiff at all times), the burden of persuasion shifts to the defendant in mixed-motives cases once it is either conceded by the defendant or determined by the fact finder that the employer considered impermissible factors in reaching its adverse employment decision. *Mt. Healthy* therefore confirms the rather uncontroversial proposition that plaintiffs are required to prove injury-in-fact in order to collect monetary damages. *See Mt. Healthy*, 429 U.S. at 285, 97 S. Ct. at 575.

Unlike the adverse employment action at issue in *Mt. Healthy*, there are two types of injury in a case involving the unlawful use of racial preferences. As the Court recognized in *Hopwood I*, 861 F. Supp. at 583, there is an intangible injury resulting from the

government's discriminatory classification which prevents a plaintiff from "competing on an equal footing" with other applicants.[21] *See Hopwood II*, 78 F.3d at 957 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211, 115 S. Ct. 2097, 2105 (1995)). All nonminorities who applied to the law school in 1992, including nonminority students who were admitted, suffered that kind of injury. A second, tangible type of injury—an injury-in-fact—occurs when a plaintiff is actually denied some right or benefit, such as admission to the law school, as a direct result of the use of unlawful racial preferences. In applying the *Mt. Healthy* framework to this case, the Fifth Circuit affirmed this Court's conclusion that the law school's 1992 admissions procedures were constitutionally flawed. With virtually no explanation, however, the Fifth Circuit then asserted that, as a result of that determination alone, the defendants bear the burden of proving that the constitutional violation against the four plaintiffs was "largely harmless." *See Hopwood II*, 78 F.3d at 957 ("In this case, there is no question that a constitutional violation occurred (as the district

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[21]The Supreme Court in *Adarand* implicitly recognized that an individual's inability to compete on an equal footing as a result of discriminatory classifications is a harm that is related to the issue of standing. In holding that the plaintiff had standing to challenge the use of racial preferences in the awarding of subcontractor bids in federal agency contracts, the Supreme Court stated:

> We note that . . . [the plaintiff] Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a discriminatory classification prevent[s] the plaintiff from competing on an equal footing. The aggrieved party need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

Adarand, 515 U.S. at 211, 115 S. Ct. at 2105 (citations and quotations omitted).

court found) and that the plaintiffs were harmed thereby."). The Fifth Circuit's analysis in this regard was incomplete at best; at worst, it was a misapplication of the *Mt. Healthy* framework because it presupposed that race was a substantial or motivating factor in every nonminority applicant's denial of admission to the law school in 1992, regardless of the applicant's qualifications to enter law school. As a matter of common sense and rudimentary mathematics, that cannot be the case.

There is no basis in fact or logic to suggest, as the Fifth Circuit apparently does in *Hopwood II,* that all resident nonminority applicants who were denied admission to the law school in 1992 were denied admission substantially–or, for that matter, even in small part–because of race. Even assuming all 96 offers of admission made to resident minorities in 1992 were available, there would still remain approximately 1,400 resident applicants in 1992 (the overwhelming majority of whom, presumably, were nonminorities) who would have been denied admission without regard to race. At most, therefore, only 7% of resident nonminority applicants were affected by the law school's use of racial preferences.[22] Suppose this case had been brought by the least

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[22]For that reason, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S. Ct. 1843 (1977) is inapplicable as well. *Teamsters* was a Title VII disparate impact case in which the Supreme Court held that once the employee establishes a system-wide pattern or practice of discrimination, the burden shifts to the employer to prove that individual hiring decisions were not made in pursuit of that policy. *See id.* at 359-60, 97 S. Ct. at 1866-67. In that case, however, the Supreme Court specifically supported the burden-shifting scheme on the ground that an employee's proof of broad-based employment discrimination creates "a greater likelihood that any single [employment] decision was a component of the overall pattern," *id.* at 361 n.45, 97 S. Ct. at 1867 n. 45, and, consequently, there are "reasonable grounds to infer that individual hiring decisions were made in pursuit of the discriminatory

qualified nonminority who applied to the law school in 1992. Under *Adarand,* that applicant clearly would have standing to challenge the affirmative action program. *See Adarand,* 515 U.S. at 212, 115 S. Ct. at 2105. However, an applicant who has no conceivable chance of admission cannot possibly show that race was a substantial or motivating factor in the law school's decision to deny him or her admission. The *Mt. Healthy* burden- shifting framework is never implicated. In contrast, *Hopwood II* always shifts the burden to the defendant—and would shift the burden even in the example of the candidate with no chance of admission—once the plaintiff establishes the unconstitutionality of the affirmative action program. But being subjected to admissions procedures that take into account racial preferences does not, in and of itself, establish or even imply that the applicant's race was a substantial or motivating factor in his or her denial. Importantly, in this case the law school, unlike the University of California in *Bakke,* never conceded that the plaintiffs would have been admitted in the absence of an affirmative action program, and this Court specifically found the plaintiffs failed to carry their burden of persuasion on that point. *See Hopwood I,* 861 F. Supp. at 581-82.

The harm in the Fifth Circuit's interpretation of *Mt. Healthy* is not readily apparent in the Court's example because it would be quite easy for the law school in that instance to establish the applicant's non-admission. The harm occurs, for example, when the suit is brought by a candidate who has some chance of admission under a race-neutral procedure but who would not be able to prove that he or she would have been admitted by a preponderance of the evidence. The Fifth Circuit decision potentially gives those

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policy," *id.* at 359, 97 S. Ct. at 1867. No similar inference can or should be made in this case: a policy that affects 7% of a given population can hardly be called broad-based or widespread, nor would it cause one to infer that an individual decision was infected by the discriminatory policy.

candidates a windfall by placing the ultimate burden of proof on the defendant: close calls must always be decided in favor of the plaintiff. And yet the function and purpose of the *Mt. Healthy* burden-shifting scheme are just the opposite—to ferret out instances of discrimination and to ensure that the plaintiff is not put in a better position than he or she ordinarily would have occupied. Indeed, the Fifth Circuit recognized in *Hopwood II* that *Mt. Healthy* was intended to give the defendant "a second chance of prevailing by showing that the violation was largely harmless." *See Hopwood II*, 78 F.3d at 957. Instead of giving the defendant a second chance of prevailing, the Fifth Circuit gives the defendant little chance of prevailing when the applicant is an extremely close call. The Fifth Circuit decision essentially allows a plaintiff to recover monetary damages without ever having to establish any injury-in-fact.[23]

Mt. Healthy does not apply to this case. One might be able to make a normative argument that the defendants should bear the ultimate burden of persuasion once the plaintiffs establish the unconstitutionality of the law school's affirmative action program, but the legal argument cannot be justified. This is a classic pretext case in which the trier of fact—in this case, the Court—must determine why each of the four plaintiffs was denied admission to the law school. If the plaintiffs were denied admission because of their race, they should have to prove it, as plaintiffs must in every

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[23]Furthermore, as a matter of public policy, it may be imprudent to apply the *Mt. Healthy* burden-shifting framework to the admissions procedures of public universities. In making its admissions decisions every year, the law school is faced with the enormous responsibility and discretion to select an entering class among applicants who share similar academic qualifications (in terms of GPAs and LSAT scores), but who have varying personal backgrounds and vastly different educational circumstances. Public universities are put in the unfortunate, perhaps even untenable, position of making such decisions with the threat of liability hanging in the background.

other pretext case brought in federal and state court. The Court therefore respectfully but strenuously objects to this portion of the Fifth Circuit opinion. The Court is cognizant, however, of the panel's instructions on remand, and it will faithfully and responsibly execute them.

A.

The defendants presented one expert on causation, Olin Guy Wellborn, a tenured professor who has taught at the law school since 1974.[24] Wellborn has served on the law school admissions committee for over 15 years and was a member of the admissions committee in 1992. In accordance with the Fifth Circuit decision, Wellborn analyzed whether the plaintiffs would have been admitted to the law school under a constitutional admissions system. *See Hopwood II,* 78 F.3d at 957 & n.55. In preparation for his expert reports, Wellborn testified he carefully examined the LSDAS sheets of approximately 450 applicants, including the LSDAS sheets of the 96 minorities admitted in 1992. *Wellborn,* vol. 1 at 45. He then narrowed the field to approximately 200 of the "most promising" minority and nonminority candidates, as reflected by their LSDAS sheets, and he reviewed those application files in their entirety. *Id.* Wellborn prepared two expert reports, employing a different methodology in each one. *See* D-519 and D-520. In both reports he concluded that none of the plaintiffs would have been admitted in a race-blind admissions procedure. *See id.*

(1) Wellborn's First Report

In his first report, Wellborn examined the 1992 admissions process and then considered how that process would have been modified in a manner that would yield the same total number of

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[24]The plaintiffs did not proffer their own expert to testify as to what a constitutional admissions system would look like or whether any of the plaintiffs would have been admitted under such a system.

admissions on a race-blind basis. Wellborn first compared the relation between an applicant's TI score and the statistical rate of admittance in the actual 1992 admissions process. Wellborn detected the emergence of a pattern in which candidates with TI scores of 203 or higher were virtually all admitted and candidates with TI scores of 184 or lower were virtually all denied. A discretionary zone candidate's statistical chance of admittance generally increased by an additional 10 or 20 percentage points with

each successive TI score.[25] Hopwood's TI score of 199 corresponded to an acceptance rate of 89%, and a TI score of 197 (the TI score belonging to Carvell, Elliot, and Rogers) corresponded to an acceptance rate of 59%. This pattern of percentages reflected a typical, yearly phenomenon.[26] *See Wellborn,* vol. 1 at 145.

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[25]The statistical breakdown for the 1992 resident admissions occurred as follows:

TI score	Nonpreferred Residents Admitted	Nonpreferred Residents Denied	% Non-preferred Residents Admitted	Minorities Admitted
203 up	169	1	~100%	4
202	27	3	90%	2
201	48	5	90%	1
200	51	4	92%	1
199	57	7	89%	4
198	34	15	69%	2
197	44	27	59%	1
196	29	44	40%	2
195	24	40	38%	3
194	15	64	19%	7
193	13	59	18%	5
192	10	57	15%	3
191	4	72	5%	5
190	5	71	7%	11
189	2	63	3%	3
188	1	57	2%	4
187	3	55	5%	9
186	2	50	4%	10
185 down	3	393	~0%	19

[26]The percentages in Wellborn's report, however, are not hard-and-fast figures, as there were small variations in the percentages from year

Because the actual 1992 presumptive admission and denial lines were lower for minorities than for nonminorities, Wellborn had to adjust the overall presumptive admission and denial lines in creating a hypothetical admissions system.[27] Wellborn therefore lowered the overall presumptive admit and deny lines to 198 and 190, respectively, and retained the 1992 average of nine votes per pile of thirty files. Wellborn assumed the law school would extend the same number of resident offers that it had extended in 1992.[28]

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to year. Furthermore, the 1992 percentages varied from other years because LSDAS was in the process of changing the LSAT scoring system from a two-digit score to a three-digit score. Under the two-digit system, applicants were more compressed along the Texas Index. Because this methodology relies too heavily on unreliable percentages of admission, the Court finds the methodology employed in Wellborn's supplemental report preferable.

[27]It was the practice of the law school to lower the presumptive admission and/or denial scores in order to generate more offers. *See Hopwood I,* 861 F. Supp. at 561-62; *Hopwood II,* 78 F.3d at 937 n.10. Wellborn did not alter the number of votes per pile for discretionary zone applicants because doing so, he testified, would have yielded too many offers.

[28]In 1992, the law school extended 637 resident offers to achieve 425 matriculants. Therefore, the overall resident yield rate, *i.e.*, the rate at which candidates accepted their offers of admission, was approximately 67%. *See Johanson Declaration,* D-332; *Hopwood I,* 861 F. Supp. at 561 n.22. The 1992 yield rate was approximately 80% for African-Americans and 73% for Mexican-Americans. Wellborn assumed the yield rate for marginal nonminority candidates in a color-blind admissions process would be higher than 67% (and probably as high as 75%) because the additional offers of admission to nonminorities would be made to less qualified (and therefore less desirable) applicants for whom the law school would probably be their first choice. *See Wellborn,* vol. 1 at 152-53.

See D-520; *Wellborn,* vol. 1 at 237. Using this methodology, Wellborn predicted a pattern of percentages in admissions almost identical to the 1992 admissions percentages, except that each percentage of admission would be "notched down" by one TI score throughout. In other words, Wellborn predicted that virtually all candidates with a TI score of 202 and above would have been admitted; 90% of applicants with TI scores ranging from 198 to 201 would have been admitted; 70% of applicants with TI scores of 197 would have been admitted, and so on down the Texas Index.[29]

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[29]Wellborn's projected statistical breakdown in a race-blind admissions procedure:

TI score	% Nonpreferred Admitted-Actual	Total Applicants	%Admitted Projected	Projected Number Admitted
203 up	~100%	174	100%	174
202	90%	32	100%	32
201	90%	54	90%	49+1
200	92%	56	90%	50+1
199	89%	68	90%	61+1
198	69%	51	90%	46+1
197	59%	72	70%	50+1
196	40%	75	60%	45+1
195	38%	67	40%	27+1
194	19%	86	40%	34+1
193	18%	77	20%	15
192	15%	71	20%	14
191	5%	81	15%	12
190	7%	87	5%	4
189	3%	68	5%	3
188	2%	63	5%	3
187	5%	71	5%	4
186	4%	65	5%	3
185	~0%	63	5%	3
184down	0%	658	0%	0

Wellborn then reexamined the application files of the four plaintiffs, the admitted minority resident applicants, and the denied nonminority resident applicants at their respective TI scores to determine who would have received the additional offers as dictated by the predetermined percentages of admission.

Wellborn predicted that one additional offer of admission would be made at Hopwood's TI score. Of the ten admitted minority and denied nonminority resident applicants at the 199 TI level, Wellborn concluded that seven applicants, including the four minority applicants, were "clearly stronger" than Hopwood and that the remaining two applicants were "comparable" to Hopwood. As in the actual admissions process in 1992, Wellborn determined that Hopwood would most likely have been placed in the discretionary zone by Professor Johanson and that she would not have received the two or three votes necessary to be admitted. At the 197 TI score of Carvell, Elliot, and Rogers, Wellborn estimated that the law school would have extended seven additional offers.[30] Wellborn identified the seven applicants he predicted would have been offered admission over Carvell, Elliot, and Rogers, and he also rated those seven applicants superior to Hopwood. Wellborn then identified four additional applicants who, although not as strong as the original seven, were still stronger than Carvell, Elliot, and Rogers. Indeed, Wellborn indicated that Rogers and Elliot were

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Adjusting the presumptive admit and deny lines would not have accounted for all of the offers that would have been made assuming the same yield rate. Eight offers would still have to be made, and Wellborn accounted for them by assuming that one candidate from each TI score between 201 and 194 would have been chosen from a waiting list.

[30]Statistically, Wellborn estimated that six additional offers would have been made at this index. He concluded, however, that the minority admittee might not have been admitted at a TI score of 197. Wellborn therefore projected seven additional offers.

"among the very weakest" at that index and that Carvell, although a stronger applicant than Elliot and Rogers, does not compare favorably because of his relatively low combined LSAT score in the 76th percentile.[31] *See* D-519.

(2) Wellborn's Supplemental Report

Using his first report as a hypothesis for how the law school would have extended offers of admission in a race-blind procedure, Wellborn undertook the more difficult task in his supplemental report of specifically identifying (1) the admitted resident minorities in 1992 who probably would have been denied admission in a race-blind procedure, and (2) the denied resident nonminority applicants who most likely would have been admitted in their place. Wellborn made several basic assumptions about a

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[31]For purposes of stacking application files into piles of thirty, the law school classified Carvell as a TI 197 applicant. Carvell's "true" TI score, using his combined LSAT score in the 76th percentile, was either 191 or 192. *See Wellborn*, vol. 1 at 70. Although it was and is the normal practice of LSDAS to average multiple scores, LSDAS did not do so in 1992 for candidates who received LSAT scores under both systems. *See Wellborn*, vol. 1 at 70-71. For purposes of reviewing Carvell's application, Wellborn testified that reviewers would have mentally discounted Carvell's TI score and would do so again in a color- blind process. *See Wellborn*, vol. 1 at 73; *see also Declaration of Steven Goode* D-336 (stating that he would discount Carvell's attempts to explain his poor performance on his first LSAT since applicants have the option of canceling their scores). At trial, Carvell objected to Wellborn's circular argument in his first report that Carvell compares unfavorably to other TI 197 applicants in part because "Carvell does not really belong at this index." *See* D-519. For purposes of his first report, Wellborn classified Carvell with other TI 197 applicants because it was Carvell's actual classification in 1992. In his supplemental report, however, Wellborn compares Carvell to the entire pool of discretionary zone applicants, including applicants with TI scores of 191 and 192.

hypothetical race-blind admissions procedure. First, as he had in his first report, Wellborn projected that the presumptive admission line would be set at 198 and that the presumptive denial line would be set at 190. He then assumed that all of the nonminority residents who had been admitted in 1992 would have been admitted in a hypothetical race-blind admissions procedure. Therefore, Wellborn only examined the application files of the 96 admitted minority applicants and the approximately 450 LSDAS reports (which he then narrowed down to about 200 application files) of the denied residents (minority and nonminority) who had TI scores above 190.[32] *See* D-520; *Wellborn,* vol. 1 at 45. In examining each application, Wellborn primarily considered the applicant's college record and LSAT score, which he weighed "about equally,"[33] and he applied identical standards to minority and nonminority candidates. *See* D-520. In evaluating the college record, he

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[32]As Wellborn testified, the fact that he only evaluated LSDAS sheets with TI scores of 190 or above was an omission that probably benefitted the plaintiffs. *See Wellborn,* vol. 1 at 50. Wellborn acknowledged that "one or two" candidates with TI scores below 190 might have been "extraordinary" enough to compensate for their low index. *Id.* To the extent that Wellborn did not consider those applicants--or, for that matter, the 250 applicants within the hypothetical discretionary zone whose entire application files might have revealed extraordinary qualities meriting the applicant's admission--Wellborn eliminated from the applicant pool a few potential competitors who probably would have been admitted.

[33]The TI scores calculated by LSDAS in 1992, on the other hand, gave slightly greater weight to an applicants's LSAT score. *See Hopwood II,* 78 F.3d at 935 n.1 (indicating that LSDAS assigned a 60% weight to a candidate's LSAT score and a 40% weight to his or her GPA in 1992). Of course, the law school is not bound by LSDAS's determination that the LSAT score should be weighed more heavily in determining admission.

considered the caliber of the school, as manifested by the LSAT college mean,[34] and the applicant's major, rank in class, and college transcript. Wellborn also considered an applicant's personal statement, letters of recommendation, and other factors and materials such as the applicant's age and background; the relevance and importance of these factors varied, of course, with each file.

In selecting a particular applicant for his supplemental report, Wellborn attempted to predict those candidates who he believed would emerge as probable admittees. He did not, in other words, only select candidates for whom he necessarily would have voted, nor did he attempt to predict how a particular admissions committee member would have voted. *See Wellborn*, vol. 1 at 231-33, 249-51. Wellborn explained his approach as follows:

> [I]f I say these candidates are the ones that I judge most likely to be admitted, and these I judge to be relatively unlikely to be admitted, that's not going to describe in exact detail the offers that go out. I'm making an overall estimate of probabilities, based upon many years of experience in watching this process and having a judgment about on the average which criteria are going to be most influential and most important to the reviewers as a group. And so, of course, there are going to be those vagaries in the voting,

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[34]The college LSAT mean is the average LSAT score of students who took the LSAT from that particular college or university. *See Wellborn*, vol. 1 at 44. In Wellborn's opinion," the college LSAT mean is the best way of comparing colleges in terms of the caliber of the student body." *See* D-520. The numbers bear out Wellborn's assessment. The 1992 LSAT means of the following universities illustrate the difference: Harvard University (40); Duke University (39); Rice University (38); Trinity University (36); the University of Texas (between 35 and 34); Texas A & M University (33); Hendrix College (32); California State University- Sacramento (28); and the University of Houston-Downtown (26).

but I still believe in the overall validity of the prediction.

It certainly is not the case—absolutely is not the case that . . . [all] denied non-minorities [within the discretionary zone] . . . have an equal chance [of admission] . . . or that a person, as familiar as I am with the process, couldn't tell you that these people have a better chance than these other people. I think . . . it would be preposterous to suggest that . . . it's just random, or that it's completely unpredictable.

Wellborn, vol. 1 at 250.

The law school made 96 offers of admission to resident minorities in 1992. Wellborn evaluated all 96 minority admittees and concluded that 19 would have been admitted without regard to race. Wellborn named this group of applicants "Group A." Wellborn then selected 2 additional resident minority admittees who, though weaker than the original 19, would still have a better chance of admission than any of the plaintiffs in a color-blind procedure ("Group B"). Subtracting the Group A applicants from the actual number of resident minority admittees in 1992 leaves 77 seats remaining for nonminority resident applicants who were denied in 1992. There were 398 nonminority residents with TI scores of 190 or above who were denied admission in 1992; therefore, fewer than 20% of candidates in Wellborn's hypothetical discretionary zone would have been offered admission. Of those 398 files, Wellborn selected 78 resident nonminority applicants[35]

[35]Wellborn initially identified 18 minorities who he believed would have been admitted in a race-neutral system. The file of one minority applicant was inadvertently omitted from the original report; Wellborn reviewed that file and concluded that the applicant would have been admitted. *See Wellborn*, vol. 1 at 89-90 and D-669 (indicating that the applicant graduated in the 98th percentile at Texas A & M University and received an LSAT score in the 96th percentile). Therefore, the original calculation of 78 additional offers is erroneous.

who he believed probably would have been offered admission in a race-blind procedure ("Group C"). As with the minority applicants reflected in Group B, Wellborn also selected an additional 20 resident nonminority applicants who he believed had a reasonable chance of admission as alternatives to the Group C candidates ("Group D").[36] Wellborn testified that none of the plaintiffs merited inclusion in either Group C or D. *See Wellborn,* vol. 1 at 115.

The plaintiffs have several objections to the methodology Wellborn used in his supplemental report.[37] First, the plaintiffs argue the random admissions procedure employed in 1992 effectively prevents the defendants from carrying their burden of proving that the plaintiffs would not have received offers of admission in a race-neutral procedure. Second, Hopwood and Carvell argue that, in contravention of the Fifth Circuit decision, Wellborn made no attempt to reconstruct the actual admissions process used in 1992 to determine which nonminority residents would have been offered admission under a constitutional system, nor did he devise a methodology revolving around either the piles of thirty or the waiting list actually generated in 1992. Third, the plaintiffs criticize Wellborn for making the assumption that all nonminority residents who were given offers of admission in 1992

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[36]Wellborn segregated the applicants by race into Groups A, B, C, and D for administrative convenience only. When evaluating the application files, he did not review the minority and nonminority files separately.

[37]Although the plaintiffs openly questioned Wellborn's integrity and ability to render an unbiased opinion at trial, they did not contend that Wellborn was unqualified to render an expert opinion regarding the plaintiffs' qualifications for admission *vis-a-vis* other denied nonminority applicants. And, other then the nonsensical objection that Wellborn is not a mathematician or statistician (discussed *infra*), the plaintiffs do not argue that Wellborn is incapable of assessing the plaintiffs' chances of admission under a constitutional admissions system.

would nevertheless have been admitted under a constitutional system. Fourth, Hopwood and Carvell argue that Wellborn's testimony is insufficient to carry the defendants' burden as a matter of law because Wellborn relied on "mere statistical likelihoods" in concluding that the four plaintiffs would have been denied admission under a race-neutral system. The Court considers each objection seriatim.

As this Court recognized in *Hopwood I*, reconstructing the actual 1992 admissions procedure is a conceptually difficult, if not "virtually impossible," task: "[T]he difficulty does not stem from the unconstitutional aspects of the procedure alone but from the random shuffle of files into stacks of thirty, each stack reviewed by different subcommittees of three."[38] *Hopwood I*, 861 F. Supp. at

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[38]Johanson recognized this difficulty as well. When asked in his 1993 deposition whether Hopwood's chances of admission would have been improved in the absence of the law school's affirmative action program, Johanson testified:

> I haven't got a clue . . . . I can't say, if she was in another stack, whether she would have gotten two votes to admit or no votes to admit . . . . What was it in that file that impressed one screener and didn't impress two? Was it the makeup of the overall competition? What was it? There is no way that—it would be not only sheer speculation, but I think it would be improper to speculate because it's just based on the misunderstanding of the relativity of every decision.

Johanson, vol.1 at 256-57.

The plaintiffs have attempted to use Johanson's testimony to demonstrate that the law school cannot establish by a preponderance of the evidence that the plaintiffs would not have been admitted under a constitutional system. Wellborn testified, however, that the validity of his predictions is not dependent on whether the admissions procedure uses stacks of thirty or whether one reviewer or group of reviewers

582 n.86. Although the stacks were weighted as closely as possible with the same number of high to low TI scores, *see Wellborn*, vol. 1 at 41, an applicant's chances for admission may in some instances have depended upon the personal tastes of the reviewers who evaluated the applicant's file and whether the applicant was placed in a stack with an unusually strong or weak pool of applicants. To the extent that the plaintiffs argue that the admissions procedure used in 1992 was inherently unfair due to the random composition of the piles of thirty and the subjectivity of each reviewer, the point is very well taken. It goes without saying, however, that this unfairness does not implicate a constitutional defect with the law school's admissions procedures. To the extent that the plaintiffs argue that the law school can never meet its burden for that reason, the point is not well taken. A particular applicant's admission to the law school in 1992 was not the result of a random and unpredictable

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evaluates all of the application files. *See Wellborn*, vol. 1 at 251-52. Likewise, Sharlot testified that, although the piles-of-thirty approach had a "certain degree of artificiality" (given the limited number of choices each reviewer could make), the voting patterns of the faculty members on the admissions committee was not aberrational or unpredictable:

> I think that as the committee, which maintained its personnel to a very large extent [for a very long time], as the committee worked over many years, there came to be a fairly high degree . . . of shared agreement as to which criteria were more pertinent and the weights that should be given to them. And that is why I believe it is possible to undertake a review of hundreds of files and to make a reasonable prediction as to the likelihood, given the make up [*sic*] of the committee, who was most likely to receive an offer of admission.

Sharlot, vol. 2 at 22-23. Using the piles of thirty was, in the Court's opinion, a flawed approach. However, the approach was intended to produce the most qualified candidates for admission, and that was the same goal Wellborn attempted to achieve in his expert reports.

process—after all, applicants were not admitted by a flip of a coin. And it is nonsense to suggest that all nonminorities who were denied admission in 1992 would have an equal chance of admission under a race-blind procedure. With or without the law school's ill-advised piles-of-thirty approach, even a superficial comparison of the four plaintiffs, for instance, reveals the varying quality of students who applied to the law school in 1992 and confirms that concrete distinctions can be made among those applicants--if not to a virtual certainty, then at least by a preponderance of the evidence.

The plaintiffs' argument that Wellborn should have reproduced an admissions procedure by which application files were randomly placed into piles of thirty and then reviewed by randomly formed screening committees is also without merit. Wellborn is a very talented law professor, but he cannot turn back the hands of time, nor does the Fifth Circuit decision require him to do so. Rather, the inquiry posed by the Fifth Circuit is whether any of the four plaintiffs would have been admitted under "*a* constitutional admissions system." *See Hopwood II*, 78 F.3d at 957 (emphasis added). The Court, therefore, does not read the Fifth Circuit opinion as instructing the defendants to replicate exactly the 1992 admissions procedure or to use the 1992 piles-of-thirty approach. First, how would one go about reproducing a random process? By the very definition of the word random, it cannot be done. The only logical, reasonable, and fair way to determine who would have received offers of admission under a constitutional system is to compare the application files of all of the admitted minorities and the denied nonminorities, and that is precisely the methodology Wellborn used in his supplemental report.[39] Furthermore, using the

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[39]In 1992, the application files in the discretionary zone were separated according to whether the applicant had a two-digit or three-digit LSAT score. *See Wellborn*, vol. 1 at 161. Although two-digit and three-digit candidates were, for the most part, compared separately in 1992, Wellborn did not separate the two groups in preparing his reports.

1992 piles of thirty would perpetuate the unconstitutional aspects of the 1992 admissions procedure. The admissions procedure employed in 1992 was fraught with constitutional error precisely because the original piles of thirty did not include any minority applicants. Those piles would never exist under a constitutional admissions system, and as a result, it would make no sense to use them now to determine whether any of the plaintiffs would have gained admission to the law school in 1992. The Court finds it more than a little baffling that the plaintiffs assert Wellborn should have utilized, as the very premise of his methodology, the admissions system found unconstitutional as a result of this lawsuit.

Likewise, using the 1992 waiting list to determine who would have been admitted under a constitutional system is equally problematic. In support of this method, Hopwood and Carvell argue that the one vote they actually received in 1992 placing them on the waiting list is more probative than any subsequent attempt to reconstruct a hypothetical race-blind admissions process. While this method certainly has some intuitive appeal, it is not the best way to determine which nonminority applicants would have gained admission in 1992 in a race-blind procedure. First, there were two waiting lists in 1992, each of which was segregated by race. *See Hopwood I*, 861 F. Supp. at 574 n.68. Second, this methodology suffers from the same defect identified with respect to the original piles of thirty: the waiting list was generated by an unconstitutional system in which minority and nonminority applicants were reviewed separately. Therefore, the waiting list created in 1992 would not exist under a constitutional admissions system. Third,

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Wellborn, vol. 1 at 159. The plaintiffs complain that Wellborn's failure to segregate applicants by their LSAT score is another fundamental flaw in his methodology. In view of the fact that Wellborn did not attempt to replicate the 1992 admissions system, the Court finds that Wellborn's failure to evaluate two-digit and three-digit candidates separately is inconsequential.

due to the change in the LSAT scoring system, 1992 was somewhat of an anomaly in that the law school had not extended a sufficient number of offers through its normal procedures. As a result, the admissions committee had to select an unusually high number of candidates—42 out of 123 applicants—from the waiting list.[40] *See Wellborn,* vol. 1 at 52-53, 144. Wellborn testified that the waiting list had been pretty well "picked over" and, consequently, the remaining eighty-one applicants on the waiting list had, in a sense, a third "no" vote denying them admission.[41] *See Wellborn,* vol. 1 at 52-54. Fourth, using the waiting list to determine who would have gained admission is, in the Court's opinion, self-defeating for all of the plaintiffs: the methodology would unfairly exclude Elliot and Rogers from consideration because they received no votes in screening, and the one vote Carvell and Hopwood each received is not necessarily probative of any increased likelihood that they would have been admitted in a race-blind procedure. Carvell's vote was from a student member of the admissions committee, not a faculty member, *see Hopwood I,* 861 F. Supp. at 566, and Hopwood's vote was essentially a "sympathy vote" from Hamilton, then the Assistant Dean of Admissions for the law school.[42]

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[40]Wellborn testified that 123 wait list letters were sent to applicants and that the "vast majority" of the waiting list offers were accepted. *See Wellborn,* vol. 1 at 55-56. Therefore, the actual number of individuals on the waiting list was somewhat smaller than 123.

[41]Wellborn explained the fact that committee members were required to cast a certain number of votes per pile meant that in some instances the last vote was "forced." In Wellborn's words, it would have been "crazy" to construct a process in advance in which anyone who received a forced vote in the screening process would automatically be admitted. *See Wellborn,* vol. 1 at 54.

[42]At the remand trial, Hamilton testified as follows:

And the Hopwood file I remember in particular having read the

The plaintiffs also argue that Wellborn arbitrarily and impermissibly "picks and chooses" among actual events in 1992 in that he (1) gave no weight to applicants who were placed on the waiting list by virtue of their one vote and (2) assumed that all nonminority applicants who were admitted in 1992 would have been admitted in a race-blind procedure. The plaintiffs urge the Court to disregard Wellborn's supplemental report entirely because, they argue, he did not reconsider all offers of admission in hypothesizing a constitutional admissions system. Not only is this argument unpersuasive, it mischaracterizes Wellborn's methodology. The plaintiffs acknowledge it was more difficult for nonminorities to achieve offers of admission in 1992; indeed, the plaintiffs brought this lawsuit for that very reason. The fact that those nonminority applicants received offers of admission under the University's admissions program is very strong evidence to support the inference that they would emerge as probable admittees under a race-neutral system. *See Wellborn*, vol. 1 at 42. Wellborn did not, therefore, arbitrarily pick and choose among real events in

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> file and agonizing over her personal situation with respect to her child. And then I returned my files to the admissions office, I checked to—I did not vote for Ms. Hopwood at all. I checked to see if other members had voted for her, and they did not. And out of sympathy for her case, again, which I had some concern about, I changed my vote to put her on the waiting list and took a vote from someone else who had already gained admission.

Hamilton, vol. 2 at 27. Although Professor Johanson had instructed committee members to conduct blind voting, Hamilton did not follow this instruction in 1992. She testified she was concerned that her voting had been "particularly aberrational" compared to other members of the admissions committee; she therefore reviewed the voting patterns of other faculty members "to try to get a sense of what was valuable." *Hamilton*, vol. 2 at 42-44.

1992; rather, he drew logical inferences based upon the admissions procedure in force in 1992. The fact that an applicant was presumptively admitted, received two or three votes in the screening process, or was an applicant chosen from the waiting list in 1992 correlates with a strong likelihood that the applicant would have been admitted in a race-blind admissions procedure; for the reasons indicated above, however, there is not a sufficiently strong correlation between receiving a position on the waiting list and an increased probability of admittance.[43] Therefore, the distinction between nonminority admittees and waiting list candidates is warranted. Furthermore, it is conceptually difficult to see the harm in the inference--to the extent that these individuals were offered admission over the four plaintiffs, it certainly was not the result of any unlawful or invidious discrimination.

Finally, the Court rejects the plaintiffs' argument that Wellborn relied on "mere statistical likelihoods" in concluding that the four plaintiffs would have been denied admission. In support of this argument, the plaintiffs cite *Smith v. Rapid Transit*, 317 Mass. 469, 470, 58 N.E.2d 754, 755 (1945), a case in which the Massachusetts Supreme Court held it is insufficient as a matter of law to prove a proposition merely by showing the mathematical chances favor the veracity of the proposition. This argument might have been valid had Wellborn conclusorily asserted, for instance, that Carvell would not have been admitted to the law school based solely on the fact that his "true" TI score of 191 or 192 correlated to a 5% to 15%

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[43]Waiting list candidates were moderately overrepresented in Wellborn's C and D Groups, suggesting some correlation between placement on the waiting list and an increased probability of admission. *See Wellborn*, vol. 1 at 211. Of the 98 Group C and D selections, 44 received one vote in discretionary zone screening in 1992. In the Court's opinion, this correlation is not strong enough to support the inference that all individuals on the waiting list would be more likely to receive offers of admission in a race-neutral world.

probability of admission in 1992. But Wellborn did not use mathematical probabilities to prove Carvell would not have been admitted to the law school under a constitutional system. Instead, Wellborn evaluated Carvell's application according to certain enumerated and, to a large extent, quantifiable criteria, compared his application to the applications of 450 other denied nonminorities, and concluded that Carvell was less qualified than the 119 applicants chosen for inclusion in his supplemental report. *See* D-520. Based on the applications in evidence, as well as his knowledge of the law school's admissions procedures, it was Wellborn's considered opinion that it was more likely than not that Carvell would not have been admitted to the law school under a race-neutral admissions system. Indeed, Wellborn reached the same conclusion with respect to the other three plaintiffs despite the fact that their relatively high TI scores correlated with a probability of admittance of greater than 50%. This objection is nugatory.

The Court therefore concludes that the methodology Wellborn employed in his supplemental report is sound. Wellborn did not attempt to handicap the chances of admission of each and every applicant who was denied admission to the law school in 1992. Rather, Wellborn presented evidence of 119 applicants who were better candidates for the study of law than the plaintiffs and who were therefore more likely to receive offers of admission under a constitutional system. In hypothesizing a constitutional admissions system, Wellborn made reasonable projections regarding the lowering of the presumptive admission and denial lines and the probable number of offers to be extended. His assumption that all nonminority resident admittees in 1992 would be admitted under a race-neutral system is not only reasonable but supported by the record. Finally, Wellborn identified reasonable criteria to evaluate the application files, and as discussed below, he applied the criteria in a fair, consistent, and nondiscriminatory way.

C.

Before Wellborn's conclusions are explored and explained, the Court offers the following disclaimer. This opinion provides more information than anyone ever needed or wanted to know about the qualifications required for admission to the law school. The Court once again undertook a painstaking review of the application files of hundreds of students, and, unfortunately, this opinion reflects the tedious and arduous process that it was. One principle the Court emphasized in its first opinion bears repeating here:

> [T]he Court appreciates the difficulty of the task facing the admissions committee each year. Evaluation of applications involves both objective and subjective factors, and the Court is aware that some evaluators could use subjectivity to conceal discriminatory motives. As a general rule, however, judges are not as well suited to evaluate qualifications of applications as those who are familiar with the process and have many years of experience evaluating applications.

See Hopwood I, 861 F. Supp. at 581 (citing *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993)).

The plaintiffs openly accused Wellborn of manipulating certain criteria and of disingenuously using the subjectivity of the admissions process to rig the desired outcome of this case. The Court emphatically finds that allegation to be false. The fact that subjective criteria necessarily informed Wellborn's analysis does not render Wellborn's opinions arbitrary or untenable. Part of Wellborn's everyday responsibilities as a law professor is to make subjective assessments of students, whether on a law school exam or as a member of the admissions committee, and the Court will not cavalierly disregard the conclusions Wellborn reached in his supplemental report simply because they involve subjective judgments. Furthermore, Wellborn credibly supported the applicants he selected, and the faculty members who originally reviewed the plaintiffs' files in 1992 universally support Wellborn's

judgment that the four plaintiffs were weak candidates for admission to the law school in 1992. *See Johanson Declaration* D-332; *Declaration of Laquita Hamilton* D-333; *Sharlot Declaration* D-334; *Declaration of Mark Gergen* D-335; *Goode Declaration* D-336.

Before delving into the specific weaknesses of each plaintiff's application, the Court makes the following observations and generalizations. First, TI scores are, to a certain degree, inherently unreliable because they do not weigh the student's GPA by major or quality of school. For example, Hopwood's GPA of 3.80, with her high number of hours from community colleges and subsequent transfer to a relatively weak undergraduate institution, does not compare favorably with a student having a lower GPA from, say, Rice, Trinity, the University of Texas, or Texas A & M. Wellborn's evaluation of Carvell's chances for admission also illustrates the artificial nature of the Texas Index. Although Carvell's "true" TI score was 191 or 192, Wellborn rated Carvell "roughly comparable" to Hopwood, "slightly better" than Elliot, and "significantly better" than Rogers. *See Wellborn,* vol. 1 at 117. Large institutions such as the University of Texas use TI scores to make general distinctions among the many students who apply. But a TI score is only as good as its two components--the student's GPA and LSAT score. They are not hard-and-fast numbers determining who is admitted, nor should they be treated as such, because to do so would unfairly reward students who attended weak undergraduate institutions or who took less-than-challenging curricula. In light of the fact that TI scores are not weighted by quality of school or difficulty of major, it is not surprising that the plaintiffs' relatively high TI scores significantly overstate their chances for admission to the law school and that Wellborn's selections ran the gamut from high to low TIs.

Second, the law school admissions process is incredibly competitive. *See Hopwood II,* 78 F.3d at 935. In fact, the Court

was astonished to discover the number of applicants with drastically better credentials than the four plaintiffs who were denied admission in 1992. For instance, of the 78 nonminority Group C applicants Wellborn selected, 31 were in the top quarter of their classes at competitive universities such as the University of Texas and Texas A & M and had LSAT scores in the 80th percentile and above. *See* D-543, 550-51, 555, 557, 560-63, 565, 568, 570, 572-73, 576-77, 580, 582, 584-85, 587- 89, 591-93, 599, 609, 611, 613, and 619. Over one third of Wellborn's Group C selections had a college class rank in the 80th percentile or higher; unlike Hopwood, however, these applicants attended competitive schools and, except for one applicant, had few, if any, hours from a community or junior college. *See* D-543, 551, 556, 558-60, 562, 564-68, 572, 574-76, 578-84, 609, and 611. Applicants similar to Carvell who had a class rank below the 70th percentile virtually all came from colleges with an LSAT mean of 34 or better such as Duke, Cornell, Rice, Tufts, and the University of Texas, and their LSAT scores in all cases were better--and in most cases were considerably better--than Carvell's combined LSAT score in the 76th percentile. *See* D-542, 544-45, 547-49, 552, 554, 569, 594-98, 602-03, 614-15, and 618. Moreover, of the 97 Group A and C applicants Wellborn predicted would have been probable admittees under a constitutional system, only 2 graduated in the bottom half of their classes, as did Elliot. One applicant earned an LSAT score in the 99th percentile and graduated in the 31st percentile of the class at the University of California at Berkeley, a 36 LSAT mean college. *See* D-524. The other applicant attended the University of Texas, majored in a rigorous liberal arts honors program called Plan II, was in the 48th percentile of the class, and earned an LSAT score in the 96th percentile.[44] *See* D-529. Wellborn did not select a single

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[44]According to Wellborn's supplemental report, these individuals had TI scores of 202 and 198, respectively, and thus would probably have been presumptively admitted under a constitutional system. *See* D-521.

applicant who, like Rogers, had been dismissed from a four-year university or who had graduated from a university with an LSAT college mean as low as that of the University of Houston-Downtown.

Third, the applicants Wellborn selected for inclusion in Groups A, B, C, and D have superior credentials to the four plaintiffs even when one looks exclusively at a combination of objective factors. After making his 119 selections, Wellborn discovered that his selections tended to satisfy the following four criteria: each applicant (1) had an LSAT score in the 80th percentile or higher; (2) had a rank in class in his or her university of at least the 60th percentile; (3) graduated from a college with an LSAT mean of at least thirty; and (4) had no more than one year in a community or junior college. None of the plaintiffs satisfies all four criteria, while the vast majority of Wellborn's selections do. Moreover, applicants who did not comply with all four criteria counterbalanced that weakness with a specific strength. For instance, five applicants in Group C have LSAT scores in the 78th percentile, and three applicants in Group A and one applicant in Group D have LSAT scores in the 74th percentile. Across the board, however, these applicants had exceptionally strong college records at high quality institutions.[45] Likewise, applicants with low class ranks offset that weakness with strong LSAT scores coupled with very competitive universities and/or particularly rigorous majors such as

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[45]In Group A, one applicant graduated in the 95th percentile of her class from Washington University, a college with an LSAT mean score of 36, *see* D-5-33; another applicant graduated from the University of Texas in the 90th percentile of her class, *see* D-539. In Group C, two applicants graduated from Trinity University where they were in the 90th and 86th percentiles of their classes, *see* D-567 and D-583; another applicant graduated in the 94th percentile of her class at George Washington University, a 33 LSAT mean school, *see* D-581.

engineering.[46]

Fourth, the inherently subjective nature of the admissions process does not, as the plaintiffs contend, provide a reason to believe that distinctions cannot be made among different applicants. Of course, reasonable minds can and do differ on the quality of particular institutions or courses of study. For instance, whether accounting is a more rigorous major than political science, economics, or English is, to the Court's chagrin, an issue of raging debate among the parties in this case. In the Court's opinion, all four courses of study provide a good background for the study of law, and the Court, like Wellborn, tended to focus more on the overall quality of the applicant's undergraduate institution and curriculum in evaluating the application files. And, the plaintiff's protestations to the contrary, Wellborn's opinion regarding the quality of certain universities is not entirely subjective. He supported his assessment of each institution with an objective criterion, the LSAT college mean.[47] *Cf.* P-414 (discretionary zone

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[46]In addition to the Berkeley and Plan II applicants described *supra* (D-524 and D-529), one applicant from Group C graduated from Rice with a GPA of 3.40 and had an LSAT score in the 83rd percentile. That applicant had also completed one semester at the LBJ School of Public Affairs at the University of Texas with a GPA of 3.77. *See* D-547. Another Group C applicant had a GPA of 2.99 from Rice with a degree in architecture and an LSAT score in the 86th percentile; the applicant also earned a master's degree from Princeton and had been working as an architect for many years. *See* D-605. The final Group C applicant was an engineering major from Southern Methodist University with a 3.07 GPA and had an LSAT score in the 90th percentile. *See* D-594.

[47]A small number of applicants attended undergraduate institutions that were too small to provide the statistical sampling needed for LSDAS to compile the college LSAT mean. In those instances, Wellborn looked at a "ribbon" showing the distribution (in terms of percentile rank) of LSAT scores by students who took the LSAT from that institution. *See*

screening instructions stating that "[t]he LSAT college mean should be used as a general indicator of the strength of the undergraduate institutions' student body "and indicating that reviewers should" 'watch out' for inflated GPA's due to community or junior college grades"). Even without such quantifiable data supporting his assessments, the Court is confident Wellborn can fairly evaluate the quality of colleges and universities around the nation given his twenty- three years as a law professor and fifteen years on the admissions committee. In addition, Hopwood, Carvell, and Rogers do not appear to object to Wellborn's use of the LSAT college mean as a legitimate means of distinguishing among universities or, significantly, to the resulting inference Wellborn draws that the applicant's GPA is inflated. Instead, they argue that Wellborn exaggerates the importance of this criterion. The Court finds that argument unpersuasive. One of Wellborn's constant themes throughout his testimony was the notion that the applicant be exposed to a "rigorous testing ground" to prepare him or her for the study of law at an elite law school. *See, e.g., Wellborn,* vol. 1 at 84. The evidence establishes an applicant's undergraduate institution can be of paramount importance in determining admission, particularly when the student attended a very weak school.

On the other hand, Hopwood and Carvell also criticize Wellborn for failing to give greater weight to or for unevenly evaluating subjective and nonacademic factors such as post-graduate work experience, good personal statements, and improvement in grades over time.[48] First, some of these factors,

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Wellborn, vol. 1 at 44, 103-04.

[48]This criticism, in the Court's opinion, is puzzling coming from the plaintiffs. At the first trial, the plaintiffs repeatedly emphasized the relative strength of their TI scores--a purely objective factor that did not account for the quality of the applicant's undergraduate institution or curriculum--as compared to minority admittees. *See, e.g., Hopwood,* vol.

such as improvement in grades and working through school, are "very common," *see Wellborn,* vol. 1 at 68, and/or are generally not given much weight, *see Goode Declaration,* D-336.[49] Second, although these kinds of subjective factors tended to support Wellborn's assessment of a particular applicant, *see Wellborn,* vol. 1 at 249, they did not appear to impact Wellborn's selections significantly except in one unusual case.[50] *See* D-538. Indeed, Wellborn testified that, with respect to marginal candidates in particular, members of the admissions committee tend to focus primarily on an applicant's balanced and consistent college

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2 at 195.

[49]Carvell contends that improvement in grades is an "important" criteria simply because the defendants listed this factor first in their answers to interrogatories regarding subjective criteria to be considered in admissions. This argument is absurd. Likewise, the Court rejects the plaintiffs' argument that reviewers *must* grant preferential consideration to subjective factors such as age or work experience because the admissions committee lists such factors as criteria to consider in determining whether a particular applicant should be admitted. For instance, Johanson (unlike Hopwood's other reviewers) reacted negatively to the fact that Hopwood had worked substantially during college; he viewed it as evidence she earned her undergraduate degree on "a slow track." *See 1994 trial transcript, Johanson,* vol. 5 at 15-16. The Court declines Hopwood's invitation to find that Johanson abused his discretion in failing to consider her work experience a "plus" factor.

[50]Although this applicant, like Hopwood, had a significant number of hours from a junior college, he completed his associate's degree in two and a half years, had a distinguished military career in the Marine Corps, had a strong personal statement in which he recounted overcoming an abusive childhood, and, importantly, transferred to a challenging undergraduate institution (the University of Texas) following junior college. He also had several strong faculty letters of recommendation. *See* D-538; *Wellborn,* vol. 1 at 99.

performance and LSAT:

> In general, I think we are talking here about the margin . . . . The unimpeachable candidates have already been admitted. I'm not asserting that these files I've selected are without fault or without weaknesses. It's a matter of relative weaknesses . . . .
>
> [I]t's a question, I think, of minimizing risk that over my years on the committee what I see members doing at this margin is looking for belts and suspenders . . . . That's why I put the emphasis on some kind of balance here with the LSAT and the college score. Those are the two biggest things . . . . [O]ur feeling is that especially in this middle zone where the LSAT and the college record kind of balance one another, they reinforce one another, it's a little more reassuring, and reassurance is what you are looking for. You're not going to get excited about these margin candidates.

Wellborn, vol. 1 at 87-88.

Part of the plaintiffs' strategy throughout the remand trial has been to find the files of a small handful of 1992 admittees who the law school faculty members opined were as qualified, or in a few instances, perhaps less qualified for admission than the plaintiffs.[51]

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[51]Hopwood and Carvell also identify three files (D-605, D-619, and D-632) they contend should not be considered under a hypothetical admissions system because they were untimely applications. In fact, only two applications (D-605 and D-632) were considered untimely; the other application (D-619) lacked a transcript, an error that was attributed to the undergraduate institution, not the applicant. The evidence establishes the law school nevertheless considered all three applications on their merits in 1992, and the Court therefore sees no reason to exclude them from consideration in this case. Even if the Court were to exclude these files

This evidence does not persuade the Court to disregard the conclusions Wellborn reached in his expert report or the assessments made by faculty members who originally reviewed the plaintiffs' files in 1992. The fact that a small number of admittees[52] had credentials similar to or worse than the plaintiffs does not lead one to the conclusion that the plaintiffs would have been admitted in a race-neutral process. At most, this evidence proves that the plaintiffs had some chance of admission, however slim, a proposition the law school has conceded all along.[53] *See Wellborn*, vol. 1 at 115. But having "some" chance of admission does not correlate to having a reasonable chance, which is the inquiry required by the burden of proof in this case. Moreover, the plaintiffs' argument rests on a fallacious premise. The plaintiffs have identified the lowest common denominator and, after determining that the plaintiffs meet or exceed that standard, have concluded that the plaintiffs would therefore have a reasonable chance of admission (or, conversely, that the defendants cannot prove that the plaintiffs do not have a reasonable chance of admission). The comparison to be drawn, however, is not among individual applicants but among the entire applicant pool. It simply does not follow that anyone on a par with the least qualified admittee would have a reasonable chance of admission, and it

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from consideration, the Court's conclusions regarding the plaintiffs' chances for admission would not be disturbed.

[52]Indeed, at trial the plaintiffs identified only 4 such applicants out of the 936 applicants who were offered admission in 1992--less than 0.5%. *See Sharlot*, vol. 2 at 3-6; *Wellborn*, vol. 1 at 221.

[53]It might be the case, for instance, that one or more of these individuals were admitted because their parents were influential alumni or generous benefactors of the University of Texas, a practice specifically condoned by the Fifth Circuit. *See Hopwood II*, 78 F.3d at 946 ("An admissions process may also consider an applicant's home state or relationship to school alumni.").

certainly does not reflect the way in which the law school selects its entering classes. Frankly, the Court draws quite the opposite inference--the fact that so few applicants comparable to the plaintiffs were actually admitted in 1992 is evidence that the plaintiffs probably would not have been offered admission in a constitutional process.

Finally, each of the plaintiffs has one or more significant weaknesses in his or her application that are not counterbalanced by a specific strength. Hopwood earned 70 of her undergraduate hours at community colleges. *See Johanson Declaration* D-332 (indicating that community colleges tend to be "non-competitive institutions with academically weak student bodies and faculties"); *Declaration of Elizabeth Chambliss,* D-338 (indicating that less than 1% of resident nonminorities admitted in 1992 had more than 70 hours of undergraduate education at a community college or junior college). Hopwood required 6 years to complete her associate's degree, resulting in an average of 10 credit hours per year. *See* P-145 (LSDAS record); *1994 trial transcript, Johanson,* vol. 5 at 15 (stating that Hopwood earned her GPA on "a fairly slow track"). She subsequently obtained a bachelor's degree from a university that is uncompetitive with the universities attended by the vast majority of students who are admitted to the law school. *See Chambliss Declaration,* D-338 (indicating that less than 2% of resident nonminorities admitted in 1992 graduated from schools with college LSAT mean scores of 28 or below).

Wellborn testified that Hopwood's LSAT score was acceptable for a marginal candidate. *See Wellborn,* vol. 1 at 67. Likewise, Hopwood's non-academic strengths (her age, the fact that she was the mother of a handicapped child, had worked her way through college, and later became a CPA) merit some "preferential consideration." *See Sharlot Declaration* D-334. However, according to Wellborn and the admissions committee members who reviewed Hopwood's application in 1992, these positive attributes

ultimately do not outweigh the negative aspects of her application, the most important factor of which is the weakness of her undergraduate education. *See Wellborn,* vol. 1 at 67-68; *Johanson Declaration* D-332 ("Her transcript shows not only that she attended weak schools, but that the bulk of her education was in technical 'how-to' courses rather than academic courses requiring analytic skills....Hopwood is simply not well-prepared academically for Law School."); *Hamilton Declaration* D-333 (stating that Hopwood's undergraduate record "reflects little analytic preparation for law school"); *Sharlot Declaration* (concluding that Hopwood's file "is very weak in comparison with the overwhelming credentials of so many of our applicants").[54]

As the Court noted in *Hopwood I,* there is little else to Hopwood's file. She provided no letters of recommendation, no personal statement, and the handwritten application is among the least impressive in appearance of all of the files examined by the Court.[55] *See Hopwood I,* 861 F. Supp. at 581; *Johanson Declaration*

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[54]In 1992, Johanson reviewed Hopwood's application file twice--first when he pulled her application from the presumptive admit zone and a second time as a part of the initial waiting list screening. *See Johanson Declaration* D-332.

[55]Hopwood contends the law school should be equitably estopped from arguing that the absence of a personal statement and letters of recommendation in her file weakened her application because of written and oral statements allegedly made by representatives and employees of the law school. Hopwood claims that in May 1991 and January 1992 she spoke to unnamed individuals in the law school's admissions office at length about the information required to complete her application. Hopwood claims these individuals told her that, based on her GPA and LSAT score, she would be within the pool of applicants who would be "automatically admitted." Hopwood claims that these representations were confirmed by the law school's 1992 bulletin, which indicated that "approximately 55% of the available admissions are automatically

D-332 ("It is also striking to see no letters of recommendation, particularly for an older applicant who has been out of school a while."). Wellborn summed up her application as follows:

> So the overall picture here I think is one that would raise a lot of concern because we don't have a candidate who has been tested at a highly competitive college environment as many, many of our applicants have. A lot of it is kind of like high school, frankly, community college, and so forth, and we--of course, we all know from our own personal experience of the high school honor student who goes to the major state university and doesn't fair [*sic*] very well. It's a lot tougher. And, of course, we feel that the University of Texas Law School is a lot tougher still. So that would be a concern here.

Wellborn, vol. 1 at 68.

Carvell's "true" TI score of 191 or 192 placed him with the group of applicants who were presumptively denied admission in 1992. Only approximately 5% of candidates with TI scores of 191 and 15% of candidates with TI scores of 192 were admitted to the law school in 1992; therefore, it is not surprising that Carvell was denied admission, as he was among an overwhelming majority of applicants with the same TI score who were not admitted.

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granted" to candidates reflecting "outstanding" GPAs and LSAT scores, *see* P-172. Based on these statements, Hopwood declined to "embellish" her application. This contention is so frivolous it barely merits discussion. Even assuming the statements were made and that the law school and the State of Texas should be bound by them, the Court finds that any reliance on those statements was unreasonable. Hopwood did not know what the presumptive admission line would be prior to submitting her application; in fact, the line was not lowered to include Hopwood's application until March 1992, well into the admissions process.

Although Carvell's personal statement was "well-written," *see Wellborn,* vol. 1 at 127, Wellborn testified that it did not compensate for the overall weakness of his application. Both Carvell's GPA of 3.28 and LSAT score in the 76th percentile were significantly below the 1992 overall GPA median of 3.52 and overall LSAT median in the 89th percentile. *See Hopwood I,* 861 F. Supp. at 563 n.32; *Hopwood II,* 78 F.3d at 937 n.7; *see also Sharlot Declaration* D-334 ("The most striking feature [of his file] is his undergraduate GPA at a school with an extremely low mean LSAT score . . . . I am also struck by the fact that this relatively unimpressive performance was by a graduate of what is reputedly one of the best public high schools in the state [Highland Park High School in Dallas, Texas]."); *Gergen Declaration* D-335 (characterizing Carvell as "an easy no vote" and indicating that his GPA was weak "even at a school that I don't suspect is very demanding"); *Goode Declaration* D-336 ("Mr. Carvell's transcript reveals a mediocre academic record from a mediocre school . . . . If Mr. Carvell could not finish in the top two-fifths of his college class, what chance is there that he would perform well in a much more competitive environment?").

Carvell provided two faculty and two professional letters of recommendation, which one of his 1992 faculty reviewers described as "strikingly weak." *See Goode Declaration* D-336. At the remand trial, Wellborn described one of the faculty letters as "not very strong" and "vague." *See Wellborn,* vol. 1 at 74. The other faculty letter by all accounts is downright negative, characterizing Carvell's classroom performance as disappointing, mediocre, and uneven. *See* P-151; *Gergen Declaration* D-335 ("I also cannot help but be impressed by a rare honest letter of recommendation intimating that Mr. Carvell is either lazy or unfocused."); *Goode Declaration* D-336 ("It is a letter that first damns with faint praise and then damns without faint praise. In this day of inflated grades and recommendations, I would definitely take notice of such a tepid assessment of Mr. Carvell's performance as

an undergraduate."). In addition, Carvell was denied admission to Vanderbilt Law School, a school which was generally considered inferior to the University of Texas in terms of national reputation. Carvell was also denied admission to the University of Texas Graduate School of Business, which is less competitive than the law school in terms of admissions, as well as Vanderbilt Business School. *See Johanson Declaration* D-332; *Carvell,* vol. 4 at 112.

Elliot's weakness, according to Wellborn, was his lack of "belts and suspenders," that is, his "consistently weak undergraduate record." *See Wellborn,* vol. 1 at 82; *Johanson Declaration* D-332 ("[I]t is preposterous to suggest that the . . . challenged affirmative action program was the cause of his [denial] . . . . Elliot is simply a weak candidate."). Wellborn testified that this type of "disparity" candidate—an applicant with a high LSAT score and low GPA, or vice versa—is occasionally admitted, but only when the scores are high enough to place the individual in the presumptive admit zone. *See Wellborn,* vol. 1 at 88. Under those circumstances, Wellborn testified, "there is a reason to take risks on [such] candidates." *Wellborn,* vol. 1 at 88. Elliot did not provide any faculty letters of recommendation,[56] leaving the committee members with no information about his college record except his "rather unimpressive 40th percentile class rank." *See Wellborn,* vol. 1 at 81-82. Even Elliot himself acknowledged his weak college record in his personal statement: "I was an average student, studying when I needed to, partying more than I should, and not managing my time

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[56]Although Elliot provided two professional letters of recommendation, Johanson described them as "not overwhelmingly impressive." *See Johanson Declaration* D-332. Additionally, Wellborn testified that members of the admissions committee generally tend to focus more heavily on letters of recommendation from faculty members as opposed to employers because faculty members "are usually commenting on students in an academic environment, which is what we are looking for." *Wellborn,* vol. 1 at 74.

efficiently . . . . [My GPA] is not of a caliber expected by the University of Texas School of Law." P-153. Furthermore, Elliot was denied admission to Baylor Law School, a school which is less competitive in terms of admission standards and, importantly, one that did not operate a significant affirmative action program in 1992. *See Johanson Declaration* D-332.

One of the issues the Court decided in the first trial was whether Elliot had standing to sue the law school. Following Elliot's rejection by the law school in April 1992, Elliot's father sent a letter to Dean Yudof complaining that the law school had rejected his son's application because of the law school's "mandatory minority and women quotas."[57] *See* P-165 (copy of the letter sent by Elliot's father). It is undisputed that Elliot's application was thereafter placed under reconsideration. Hamilton testified that the law school offered Elliot admission in August 1992, shortly before classes were to begin. The law school asserted at the first trial that Elliot lacked the standing to sue because he declined his offer of admission. *See Hopwood I,* 861 F. Supp. at 565-66. On remand, the Fifth Circuit instructed the Court to reconsider its "contradictory" findings in *Hopwood I* that (1) Elliot was not notified of his admission to the law school, and (2) Elliot would not have received an offer of admission even under a constitutional system. *See Hopwood II,* 78 F.3d at 957 n.57.

As the Court indicated in *Hopwood I,* Hamilton was the only law school official to testify that Elliot was extended an offer of admission. Unlike other applicants who were admitted late in the process, there was no documentation in Elliot's file to substantiate Hamilton's claims, and Elliot testified at the first trial that he was unaware he had been offered either a place on the waiting list or

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[57]For the record, the law school's 1992 admissions procedures did not impose quotas or grant admissions preferences on the basis of sex. Mr. Elliot was mistaken.

admission to the law school. *See Hopwood I*, 861 F. Supp. at 565-66. Indeed, Johanson testified at the first trial that "it was 'quite unusual' for someone to be reconsidered and placed on the waiting list without [his] awareness of the decision." *See id.* at 566 & n.44; *1994 trial transcript, Johanson*, vol. 5 at 19. Furthermore, the Court found several discrepancies in Hamilton's trial testimony and affidavit, which, in addition to the troubling lack of documentation, "weigh[ed] in Elliot's favor" in terms of determining whether Elliot had standing to sue the law school. *See id.* at 566. The Court therefore found in *Hopwood I* that no offer of admission had been communicated to Elliot, that is, that *no offer of admission had been made*.[58] Moreover, Elliot's application was only placed under reconsideration because of the letter sent by Elliot's father. In a race-neutral world, the letter would not have received the special treatment that it did in 1992, and Elliot's application would not have been reconsidered. *See Wellborn*, vol. 1 at 80-81.

Wellborn testified that Rogers's extremely weak college record prevented his admission to the law school despite his relatively high LSAT score. Rogers earned a bachelor's degree in professional writing, a non- standard major, from the University of Houston-Downtown, a college with one of the lowest LSAT means Wellborn testified he has ever seen.[59] *See Wellborn*, vol. 1 at 83. Rogers's

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[58]Admittedly, the Court used a poor choice of words when it wrote, "Elliot was not notified of his admission to law school." *See Hopwood I*, 861 F. Supp. at 566. The Court recognizes that the sentence could lead one to the implicit conclusion that an offer of admission had been contemplated by the law school but simply not communicated to Elliot. The Court did not intend for readers to reach that conclusion and regrets the error.

[59]The University of Houston-Downtown is a separate campus from the University of Houston-Main Campus, and the two campuses therefore have different LSAT college means (26 and 30, respectively).

cumulative GPA of 3.13 was significantly below the overall 1992 GPA median of 3.52. Although Rogers also received a master's degree in professional writing from the University of Southern California in 1992, one of the law school admissions committee members who reviewed his file in 1992 described Rogers's performance there as "decidedly unimpressive." *See Gergen Declaration* D-335. Prior to graduating from the University of Houston-Downtown, Rogers attended the University of Texas, where he was placed on scholastic probation once and flunked out twice over a period of three and a half years.[60] Wellborn concluded that Rogers was "clearly" the weakest of all of the applicants with a TI score of 197. *Wellborn,* vol. 1 at 82. And, Rogers's assertions that he was a "turnaround" candidate to the contrary, Wellborn testified:

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[60]Rogers argues the fact that he was dismissed from the University of Texas as an undergraduate is not a valid reason to deny him admission to the law school. Rogers identifies one individual who also was dismissed from the University of Texas as an undergraduate but who was nevertheless admitted in 1992. *See* P-304. If anything, the individual identified by Rogers is the exception that proves the rule. *See Gergen Declaration,* D-335 ("[I]t would take a great deal of redemption to overcome the disastrous performance as an undergraduate at [the University of Texas]."). That applicant had a TI score of 204, received an LSAT score in the 99th percentile, and returned to the University of Texas at Austin where he participated in the history honors program. *See* P-304. The applicant graduated with a cumulative GPA of 3.10 and received almost all A's after his return from academic dismissal. In addition, the applicant provided 3 exceptional faculty letters of recommendation. One professor describes the applicant as one of the 10 best of the 10,000 students he had ever taught. *See* P-304. Another describes him as better than the 2,500 students he had ever taught; the professor observed, "[o]n reflection, I wish I had the nerve to ask him to grade the course rather than take it." *See* P-304. Frankly, Rogers's application does not compare.

> [T]his was not the picture of someone who just had a shaky start or one bad semester when they were having trouble, but this was extended over a three and a half year period. Three strikes. And that was his experience at a major institution . . . . [H]e did make high grades later on at his degree school, but it's not as through he transferred to a school that would provide a rigorous testing ground in our opinion.

Wellborn, vol. 1 at 84. In addition, Rogers provided no letters of recommendation and his answers to the questions on the application form were brief and relatively uninformative. *See* P-171. Given Rogers's disastrous three and a half years as an undergraduate at the University of Texas and his subsequent failure to distinguish himself academically, the Court is convinced beyond any doubt that Rogers would never be admitted to the law school under any circumstances.

The Court regrets having to discuss publicly and in such great detail the specific weaknesses in each of the plaintiffs' applications. It goes without saying that their applications do not reflect the sum of their existence as students or individuals. And even though the Court finds the plaintiffs were not denied admission to the law school as a result of the unlawful use of racial preferences, the Court once again acknowledges "the gravity of the noneconomic injury to persons denied equal treatment." *See Hopwood I,* 861 F. Supp. at 583. On a final note, being denied admission to the University of Texas School of Law should not be the defining moment in any of these plaintiffs' lives. At the risk of sounding trite, there are much greater tragedies in life. Each year the law school denies admission to many bright, qualified, and deserving individuals simply because there are not enough spaces available in each entering class. The plaintiffs should not let their denial letters from 1992—or this lawsuit—continue to determine the course of their lives or prevent them from becoming successful lawyers if that

is a goal they still wish to pursue.

IV.

The Court makes the following alternative findings of fact and conclusions of law regarding each of the plaintiffs' damages to ensure there is no third trial and for the benefit of the circuit court. It should be emphasized, however, that the Court made the following finding in the first trial: "[H]ad the plaintiffs been entitled to damages, none of them established monetary damages as required under the law and rules of this circuit" because the evidence presented merely "consisted of each plaintiff's testimony and speculation about the value of a law degree." *Hopwood I,* 861 F. Supp. at 583. It is beyond the intellectual skills of this Court to comprehend why the plaintiffs have been given a second trial to present evidence regarding damages when they utterly failed to present competent evidence on damages at the first trial.[61] Nevertheless, the Fifth Circuit has instructed the Court to consider new evidence on damages, including damages allegedly accrued since May 1994. *See Hopwood II,* 78 F.3d at 957 ("[T]he law school's inability to establish the plaintiff's non-admission . . . opens a panoply of potential relief, depending in part upon what course that plaintiff's career has taken since trial in mid-1994.")[62]

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[61]Because the Fifth Circuit gave no weight to the Court's more conclusory finding in its first opinion that the plaintiffs did not prove their damages by a preponderance of the evidence, the Court finds it necessary in this opinion to provide very detailed and extensive findings regarding damages.

[62]The defendants likewise object to any damage award in light of the Court's factual finding at the first trial that the plaintiffs failed to prove any damages resulting from their rejections by the law school. Additionally, the defendants argue they cannot be held liable for monetary damages because the State of Texas enacted its admissions program in response to a court-ordered investigation of Texas's public

Each of the plaintiffs, with varying degrees of enthusiasm, has requested on order from this Court directing his or her admission to the law school.[63] *See Hopwood,* vol. 2 at 177; *Rogers,* vol. 2 at 86; *Elliot,* vol. 3 at 268. To the extent the Fifth Circuit concludes the plaintiffs were denied admission as a result of the law school's unconstitutional admissions procedures, an injunction ordering the law school to admit Hopwood, Elliot, and Rogers would be the most appropriate and equitable remedy the Court could fashion. The remaining issues, therefore, are (1) whether Hopwood, Elliot, and Rogers have proved any economic damages for lost earnings in their second trial; (2) whether Carvell has established any economic damages; and (3) whether Hopwood and Carvell have established any damages for mental anguish.[64] The plaintiffs must prove their

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higher education system by the United States Office of Civil Rights ("OCR") and the Department of Education. In the late 1970s, the OCR found that Texas was in violation of Title VI for its failure to eliminate the vestiges of its former *de jure* segregation of public higher education. In an effort to comply with directives from the OCR, Texas instituted a plan to increase enrollment of blacks and Hispanics in public higher education. In June 1983, after years of negotiations between the OCR and the State of Texas, the OCR conditionally found Texas in compliance with Title VI, but the OCR required Texas to continue to implement plans to increase minority enrollment. These plans paved the way for the continued receipt of federal funds for public higher education in Texas. *See Hopwood I,* 861 F. Supp. at 555-57 (discussing the negotiations between the OCR and the State of Texas regarding Texas's failure to comply with Title VI). Notwithstanding the factual validity of these two arguments, the Court complied with the instructions of the Fifth Circuit.

[63]As discussed more fully in Part IV(B) *infra,* Carvell was the only plaintiff who attended law school following his rejection by the University of Texas.

[64]Elliot and Rogers did not seek any mental anguish damages. *See Elliot,* vol. 3 at 269-71; P-322; Rogers, vol. 2 at 96-99, 101-11.

damages by a preponderance of the evidence, and damages which are too speculative, remote, or conjectural cannot be awarded. Collectively, the plaintiffs request over five million dollars in compensatory damages, three million dollars of which is sought for emotional injuries. This figure is exponentially higher than the requests for damages made at the May 1994 trial. *See 1994 trial transcript, T. Smith,* vol. 26 at 40 (counsel for plaintiffs explaining to the Court in closing arguments that the plaintiffs' damages "are not great").[65]

Hopwood, Elliot, and Rogers request damages for loss of future income resulting from the delay in their legal education. The defendants contend these so-called "front pay" damages are not available in nonemployment cases, in part because they are not foreseeable by educational institutions.[66] They argue that the law school, in rejecting thousands of applicants each year, does not foresee that denied applicants will forego their law school plans entirely but merely that they will have to attend law school elsewhere. While the foreseeability of a plaintiff's injury is

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[65]This statement by the plaintiffs' lawyer is virtually an admission that the damages after the first trial result from the lawsuit itself, which damages, of course, are not compensable. The scope and measure of both economic and emotional damages should have been the same after the May 1994 trial and post-appeal.

[66]The defendants argue that the evidence Hopwood, Carvell, and Rogers presented on damages is legally insufficient because they did not compute their future income stream using the below market discount rate method set forth in *Culver v. Slater Boat Co.,* 722 F.2d 114 (5th Cir. 1983), *cert. denied, Reederei v. Byrd,* 467 U.S. 1252 (1984); the Court did not consider this argument because it was not factually persuaded that these plaintiffs suffered any economic damages.

irrelevant in the context of intentional torts,[67] the argument raises two related points. The first point relates to the remote and speculative nature of the plaintiffs' injuries. The Court emphatically rejects the notion that the defendants' actions prevented Hopwood, Elliot, and Rogers from becoming lawyers. At most, the law school prevented the plaintiffs from obtaining a law degree from the University of Texas. Many rejected applicants—Carvell, for instance—successfully attend other law schools. The second point pertains to a plaintiff's ability to prove front pay damages in a Title VI case. As a practical matter, front pay damages may simply be too speculative or attenuated given the injury in this case—the denial of a seat in law school. Hopwood, Elliot, and Rogers have the burden of establishing they would have successfully graduated from the University of Texas and attained full-time employment as lawyers. To the extent this case is remanded for damages, the Fifth Circuit implicitly rejected the argument that front pay damages are always improper under Title VI or too speculative as a matter of law. But in determining whether a front pay award is appropriate in this case, the Court must grapple with the inherently speculative nature of the plaintiffs' damages—particularly when, as in the case of Hopwood and Carvell, the requests for damages extend forty years into the future. With these two thoughts in mind, the Court now turns to each plaintiff's request for damages.

A.

Hopwood contends she suffered economic damages in the amount of $1,360,000, which she claims is the projected career earnings differential between an accountant, her current profession, and an attorney. *See* P-477. Hopwood additionally seeks

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[67]The Fifth Circuit overruled the Court's determination that the defendants did not intentionally discriminate under Title VI. *See Hopwood II*, 78 F.3d at 957.

$1,500,000 in emotional distress damages she claims resulted from her denial of admission to the law school. *See* P-459.

(1) Damages for Loss of Future Income

Hopwood is not entitled to any monetary damages for the alleged loss of future income as an attorney. The Court fails to find from a preponderance of the evidence that Hopwood would have completed her law degree by January 1996: she would not have graduated from law school due to a series of personal tragedies occurring from 1992 to 1996, the time period during which she would have been attending law school. Hopwood contemplated limited enrollment at the law school before she applied for admission in 1992. In a letter attached to her application to the law school, Hopwood sought information regarding reduced participation so that she could continue to care for her severely handicapped daughter Tara while attending law school. *See Hopwood,* vol. 1 at 132-33. Hopwood testified at trial that Tara "required a substantial amount of energy and time, and had a large number of doctors appointments and hospital visits [and] surgeries." *See Hopwood,* vol. 2 at 239. Furthermore, Hopwood's husband was in the military and traveled extensively, *see Hopwood,* vol. 2 at 239, during which time Hopwood was Tara's primary caretaker. In addition, Hopwood was living in San Antonio, Texas at the time and would have been commuting to the law school seventy miles each way for three years.

Hopwood became pregnant with her second daughter Erica in August 1992, immediately before the start of the law school Fall semester. *See Hopwood,* vol. 2 at 221. During what would have been the end of Hopwood's first year in law school, Erica was born. Erica passed away on May 18, 1993, the day following her birth. *See Hopwood,* vol. 2 at 221. Hopwood continued as Tara's primary caretaker and began experiencing marital difficulties due to the stress and depression related to the impending death of Tara and to the demands Hopwood placed on her husband to move away from

Texas. *See Hopwood,* vol. 2 at 170-71, 222-23. In June 1995, Hopwood and her husband separated, presumably leaving Hopwood as Tara's sole caretaker. On November 23, 1995, Tara passed away. *Hopwood,* vol. 2 at 176. In February 1996, Hopwood relocated from San Antonio, Texas to Columbia, Maryland, and her husband moved to Korea. *See Hopwood,* vol. 2 at 222-23.

Hopwood's limited employment during this time reflects the toll these events took on her professional life. Hopwood was unemployed from June 1991 to January 1993. *See Hopwood,* vol. 2 at 229. From January 1993 to May 1995, Hopwood worked on a part-time basis as a CPA for a sole proprietorship in San Antonio; although she worked full-time during tax season, she was able to do so only because she frequently worked out of her home. *See Hopwood,* vol. 2 at 230-31, 240. In anticipation of her move to Maryland, Hopwood was not employed from May 1995 to February 1996. *See Hopwood,* vol. 2 at 232. From February 1996 to May 1996, Hopwood worked as an accountant for a temporary agency, and for most of the remainder of the year she was unemployed. In January 1997, Hopwood received her first full-time employment as a CPA since mid-1991. *See Hopwood,* vol. 2 at 228, 233-34. Hopwood testified that she could have worked full time as a CPA during these years, but she choose not to do so in part because she knew she had a limited amount of time with her daughter Tara. *See Hopwood,* vol. 2 at 240.

The Court is not suggesting that women with families or severely handicapped children are incapable of successfully pursuing a law degree or that individuals who suffer tremendous personal tragedies lack the will or ability to accomplish their goals. However, in this case the facts are clear: Hopwood was facing many serious obstacles, as well as enormous time constraints, that would have undermined her ability to earn a law degree during the 1992 to 1996 time frame. It would have been virtually impossible for anyone--female or male--to complete a law degree traveling 150

miles per school day to a highly competitive environment such as the University of Texas while undergoing similar strains in his or her personal life.[68] Supporting the Court's finding that Hopwood would not have graduated from law school is her own testimony. *See Hopwood,* vol. 2 at 172 (testifying that "Tara died unexpectedly ... I didn't feel I was mentally or emotionally ready to handle what I know is a very difficult coarse [*sic*] load in the law program"); *Hopwood,* vol. 2 at 175-76 (testifying that she has had a "sporadic work history" since Tara's death). Hopwood's previous academic performance supports the Court's conclusion as well. It took Hopwood eight years (instead of four) to earn her undergraduate degree because difficult financial circumstances forced her to spend much of her time working. In addition, although Hopwood repeatedly refers to earning a law degree as a lifelong dream, she has not demonstrated her commitment to that goal by seeking admission to any law school following her rejection from the University of Texas in 1992. *See Hopwood,* vol. 2 at 172.

Even assuming Hopwood would have completed her law degree, the evidence she proffered to prove economic damages did not reasonably predict any loss in earnings she may have suffered as a result of her denial of admission to the law school. Hopwood's first expert witness regarding her economic damages was economist Wayne E. Ruhter, Ph.D. Ruhter performed two analyses, "Analysis I" and "Analysis III," to determine the career earnings differential between attorneys and accountants. *See* P-477. In Analysis I, Ruhter compared attorney salaries in the private sector in Texas and

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[68]The Court is not finding Hopwood incapable of passing the courses; to the contrary, to the degree Hopwood would have been able to take and complete her courses, the Court believes she would have received a passing grade.

the mid-Atlantic region with accountant salaries in Philadelphia.[69] *See* P-477, Exhibit I, Tab 3, Analysis 1-Table 3. Ruhter assumes Hopwood would progress from associate to partnership level in both career paths. In Analysis III, he utilized 1990 Census data, which did not reflect any particular career path or geographic location, to determine the difference in career earnings between female attorneys and female accountants. *See* P-477, Exhibit III, Tab 3, Analysis 3- Table 3. In both Analysis I and III, Ruhter assumed Hopwood would have graduated from law school, passed the bar exam, attained full-time employment by January 1996, and continued working until she reached age 75 in the year 2037. Subtracting the costs of attending law school, Ruhter concluded the present value of Hopwood's economic damages to be $424,604 in Analysis I and between $400,364 and $416,876 in Analysis III. *See Ruhter*, vol. 2 at 258, 265-66. Finally, Ruhter concluded in Analysis II that Hopwood could not have mitigated her damages by enrolling in law school in 1997.[70] *See Ruhter*, vol. 2 at 272.

In the Court's opinion, Ruhter's expert report was riddled with so many untenable premises, logical inconsistencies, and unreliable and inappropriate sources that it cannot support an award of economic damages. By Ruhter's own admission, his expert report is merely "an evaluation of two career paths" that examines the

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[69]Ruhter relied on the David J. White Survey for attorney salaries in private law firms in Dallas, Houston, Philadelphia, Baltimore, and Washington, D.C. Ruhter gave special consideration to attorney salaries in Texas because many graduates of the law school remain in Texas following graduation. *See Ruhter*, vol. 2 at 254. He also considered attorney salaries from the mid-Atlantic region because that is where Hopwood is currently living. *See Ruhter*, vol. 2 at 253-54. For data on accountant salaries, Ruhter relied on the ROMAC Report.

[70]Ruhter did not examine whether Hopwood could have mitigated her damages by enrolling in law school in 1993, 1994, 1995, or 1996. *See Ruhter*, vol. 3 at 65.

potential career earnings that are "available" to Hopwood as an attorney and an accountant. *Ruhter,* vol. 2 at 253, vol. 3 at 48, 53. Ruhter unequivocally stated that he did not specifically attempt to "forecast" Hopwood's losses. *Ruhter,* vol. 3 at 71. Furthermore, prior to preparing his expert report, Ruhter did not interview Hopwood or her current employer or obtain enough information about Hopwood to predict her future earnings capacity to any reasonable degree of certainty. *See Ruhter,* vol. 3 at 45, 48-49. It is from this initial, misguided premise that all other errors in his report flow. Some, but by no means all, of the more glaring problems are described below.

First consider Analysis I. The accountant career path does not reasonably predict Hopwood's future earnings. Ruhter uses salary information from Philadelphia to predict future earnings (even for 1997) instead of reasonably predicting earnings from her current employment in Columbia, Maryland. *See Ruhter,* vol. 3 at 53. Similarly, the attorney career path is implausibly optimistic, resulting in wildly inflated future earnings. Ruhter assumes Hopwood would (1) become a partner (2) in eight years (3) in a private law firm (4) in a large city in Texas or the mid-Atlantic region. That particular career path is one of the most lucrative a lawyer can take and is extremely difficult and rare. *See* D-513, Report of Stephen Mims; *Ruhter,* vol. 3 at 48- 49 (recognizing that salaries for private law firm practice are generally higher than for government, corporate, or public interest practice); *Mims,* vol. 3 at 236 (stating that approximately less than 9% of University of Texas law graduates from the class of 1987 are partners at large law firms by the year 1996). Furthermore, because empirical information related to partnership buy-ins was unavailable, those costs are not reflected in Analysis I.[71] *See Ruhter,* vol. 2 at 268-69. The Court

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[71]Even more troubling to the Court is Ruhter's failure to account for the benefits of *not* being a lawyer. Presumably one of the reasons for the salary differential is that, on average, lawyers tend to work longer, harder

also questions the use of the David J. White Survey as an appropriate source to project the growth rate of attorney salaries. *See* D-684, Tab 17 (indicating the survey does not ensure that the same law firms respond to the survey each year it is given).

The most compelling reason to discount Analysis I, however, is its logical inconsistency. Hopwood graduated with an accounting degree in 1988 and earned her CPA license in 1991. *See Hopwood,* vol. 2 at 140-41. Ruhter does not begin to measure Hopwood's earnings capacity as an accountant, however, until 1997. Prior to 1997, Ruhter uses Hopwood's actual earnings, which, due to her personal circumstances, were low. *See* P-483. Had Ruhter properly measured Hopwood's earnings capacity as a CPA starting in 1992, his own methodology reflects that she would have earned more money over her lifetime by continuing to work as an accountant as opposed to enrolling in law school in 1992. *See* D-508, Report of James R. Vinson, Ph.D., Table I (indicating that Hopwood's career earnings as a CPA would have exceeded her attorney career earnings by $31,412); *see also Ruhter,* vol. 2 at 271 (acknowledging that there is an opportunity cost associated with a delay in education). If, as Ruhter testified, Analysis I was intended to be a hypothetical comparison of the lifetime earnings available to Hopwood as an accountant and as a lawyer, the analysis should have accounted for Hopwood's ability to earn as an accountant since the time she earned her degree in 1988 or, at the very latest, since she obtained her CPA license in 1991.

The chief problem with Analysis III is the unreliability and inappropriateness of the Census data which serves as the source for Ruhter's conclusions. The salary information reflected in the data

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hours than accountants and require more years of education. It seems inherently unfair to award Hopwood the lifetime salary differential between accountant and attorney earnings without even attempting to take into account such quality of life issues.

is self-reported by employees. Self-reporting does not, in and of itself, necessarily render the data inaccurate, but in this case there are other indicia of unreliability. First, some of the data is implausible on its face. For instance, the Census includes salary information on individuals with less than a high school education who claim to be lawyers. *See* P-477, Exhibit III, Tab 11. Second, the Census significantly undervalues Hopwood's future earnings potential as an accountant because the data pertaining to accountant salaries includes information for bookkeepers and accountants who, unlike Hopwood, have not obtained a CPA license. *See Ruhter,* vol 3 at 44-45, 94-95. Unrelated to the problem of self-reporting is the fact that salary information is categorized by age and, consequently, years of experience. While the average age of a female law graduate is twenty-six, Hopwood would have been thirty-four had she graduated from the law school in 1995. *See Ruhter,* vol. 2 at 266. Ruhter overstates Hopwood's earnings potential as a lawyer because the Census data he uses in Analysis III compares Hopwood to females who, as a result of their additional eight years of experience, would undoubtedly have higher earnings than Hopwood. *See* P-477, Exhibit III, Tab 11. Ruhter belatedly recognized this problem and performed Alternative Analysis III, in which he replaces the Census data related to lawyer salaries for the years 1995 to 2000 with data from the David J. White Survey. This approach is perhaps even more flawed because it improperly compares two sources of data for attorney salaries (five years of data from the David J. White Survey and thirty-five years of data from the Census) and only one source of data for accountant salaries (forty years of data from the Census). As Ruhter himself acknowledged, as a general rule it is inappropriate to use different sources of information in a comparative study because doing so can create a bias in the results. *See Ruhter,* vol. 3 at 56.

The remaining $900,000 Hopwood claims in economic damages is based on the testimony of Bradford W. Hildebrandt. Hildebrandt is chairman of Hildebrandt, Inc., a management

consultant and placement firm related to the legal profession. *See* D-501 (Hildebrandt's Report). Hildebrandt is not an economist and did not perform an independent study of Hopwood's economic losses. *See Hildebrandt,* vol. 3 at 106. Instead, he reviewed the accuracy of the attorney compensation figures in the private sector as reflected in Ruhter's Analysis I. Hildebrandt testified that Ruhter's figures, which project an average annual partner salary of $219,699, undervalue partnership compensation for University of Texas graduates by approximately $100,000 per year. *See Hildebrandt,* vol. 3 at 107. The Court rejects Hildebrandt's testimony for two reasons. First, Hildebrandt's testimony was wholly dependent upon the accuracy of Ruhter's Analysis I, which the Court has already found unpersuasive. Second, his testimony was inapposite to Hopwood's case. It is sheer speculation whether Hopwood would have completed law school, much less whether she would have had an academic record sufficient to result in her recruitment by a private law firm, whether she would have remained at that law firm for eight years, and whether she would have been selected as a partner in that law firm. In short, Hopwood has failed to establish by a preponderance of the evidence that she has suffered the economic damages alleged as a result of being denied admission to the law school.

(2) Mental Anguish Damages

Neither the Supreme Court nor the Fifth Circuit has specifically held that mental anguish damages are recoverable in a suit brought pursuant to Title VI. Although a majority of the Supreme Court in *Guardians Association v. Civil Service Commission of City of New York,* 463 U.S. 582, 103 S. Ct. 3221 (1983), would allow a plaintiff to recover compensatory damages for intentional violations of Title VI, the Supreme Court did not definitively describe the scope of such remedies under the statute. *See Shinault v. American Airlines, Inc.,* 936 F.2d 796, 803 (5th Cir. 1991) (quoting *Guardians* for the proposition that damage remedies under Spending Clause statutes

such as Title VI may be limited). The lower federal courts have been grappling with the issue since *Guardians,* and the law in this area is therefore somewhat muddled. *See, e.g., Eastman v. Virginia Polytechnic Institute,* 939 F.2d 204, 208 (4th Cir. 1991) (concluding that compensatory damages for pain and suffering are not available under Title VI and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (West 1994), which forbids discrimination on the basis of disability).

In *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 71, 112 S. Ct. 1028, 1035 (1992), the Supreme Court held that "federal courts have the power to award any appropriate relief" under Title IX, a statute that was patterned after Title VI.[72] Since *Franklin,* the strong trend among federal courts is to allow plaintiffs to recover for mental injuries under Title VI and similar federal anti-discrimination statutes. *See Rodgers v. Magnet Cove Public Schools,* 34 F.3d 642, 644 (8th Cir. 1994) (holding that "the full spectrum" of legal and equitable remedies are available under Title VI and Section 504 of the Rehabilitation Act of 1973); *Waldrop v. Southern Co. Serv., Inc.,* 24 F.3d 152, 156-157 (11th Cir. 1994) (citing *Franklin* for the holding that the full panoply of legal remedies are available under Section 504 of the Rehabilitation Act); *Pandazides v. Virginia Bd. of Educ.,* 13 F.3d 823, 830 (4th Cir. 1994) (overruling *Eastman* in light of *Franklin*). In any event, this issue is a question of law that is better left to the Fifth Circuit should the panel deem it proper to reach the issue of damages. The Court merely assumes for purposes of this order that mental anguish damages are recoverable under Title VI.

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[72]Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (West 1994) ("Title IX"). Title IX prevents discrimination on the basis of sex by any education program or activity receiving federal funds. *See* 20 U.S.C. § 1681(a).

To the extent the Court fails to find by a preponderance of the evidence that Hopwood would have completed her law degree, the defendants are not liable for any mental anguish damages because there is no causal connection between the harm and the violation. *See, e.g., Patterson v. P.H.P Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996) (asserting the general principle that there must a causal connection between the injury and any award for damages). Even assuming Hopwood would have earned a degree from the law school, several of Hopwood's claims for emotional injury are not compensable because they are not the result of the defendants' conduct. For example, claims for damages related to Hopwood's allegation that the defendants falsely maligned her qualifications in the media pertain to the litigation she initiated and the justifiable defense of this case and therefore are not recoverable.[73] *See Hopwood*, vol. 2 at 187-90 (describing her voluntary media appearances and interviews). Other claims for damages, such as her contention that the law school's discrimination was a factor that caused her to begin smoking, are frivolous and do not merit discussion.

Hopwood testified she experienced frustration, depression, disappointment, diminished self-confidence, and anger as a result of being denied admission to the law school. *See Hopwood*, vol. 2 at 170. In her interrogatory responses, Hopwood also claims feelings of hopelessness, confusion, anxiety, embarrassment, inability to concentrate, indecisiveness, inadequacy, and stigmatization. *See* P-459; P-464. Finally, she contends her rejection by the law school indirectly strained her marriage. *See Hopwood*, vol. 2 at 170-71; P-470 (deposition testimony of friend confirming these feelings). Hopwood testified she did not

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[73]Carvell was also "upset" and "bothered" by public statements made by the defendants and other state officials during the pendency of this case. *See Carvell*, vol. 4 at 108. These damages, if they exist, are not compensable.

experience any physical symptoms or pain, nor did she seek any psychiatric or medical care, as a result of being denied admission, although she did occasionally discuss the situation with a therapist from whom she had sought grief counseling following Erica's death. *See Hopwood,* vol. 2 at 217-18.

In addition to Hopwood's testimony, the Court heard corroborating evidence regarding the nature and extent of her emotional injuries from Paul Lees-Haley, Ph.D. Lees-Haley is a forensic psychologist, not a mental health provider, and has never treated Hopwood for any mental injury. Rather, Lees-Haley evaluated Hopwood based upon her self-reported complaints to determine whether Hopwood suffered any emotional injury as a result of the defendants' actions. *See* P-526 (Expert Report); Lees-Haley, vol. 3 at 153. Lees-Haley testified that Hopwood suffered some emotional distress from three independent sources: (1) the law school's discrimination against her, (2) the law school's rejection of her application for admission, and (3) public comments made by the law school and her interactions with lawyers in the case. *See Lees-Haley,* vol. 3 at 152.

Lees-Haley diagnosed Hopwood with chronic "adjustment disorder with mixed anxiety and depressed mood," which he believes occurred partly in response to the "stressor"[74] of being denied admission and of being a victim of discrimination. *See Lees-Haley,* vol. 3 at 155-56. He states in his report that adjustment disorder "typically resolves within six months unless the symptoms are in response to . . . a stressor that has enduring consequences," such as Hopwood's rejection from the law school. P-526. Lees-Haley also testified that the law school's actions aggravated other

[74]Lees-Haley defines a "stressor" as an experience, either positive or negative, "that usually involves change in the patient's life that's great enough that it requires some coping or adjustment." *Lees-Haley,* vol. 3 at 192.

mental injuries, such as those resulting from the deaths of her children, the break-up of her marriage, and the loss of a job. *See Lees-Haley,* vol. 3 at 152; P- 526 ("[Hopwood] plausibly suggests that had she been accepted to law school, some of the other problems and their effects might have been mitigated to some degree ... because at least she would not have had the feeling she had lost all of her dreams at once."). On the other hand, Lees-Haley testified that the law school's actions "might have caused some mild disability in the sense of making it harder for her to concentrate," but that they have not caused Hopwood any "permanent" problems that will cause her "pain and suffering and disability . . . for the rest of her life." *Lees-Haley,* vol. 3 at 154; vol. 3 at 209-11 (indicating that Hopwood is not suffering from any disability and is fully functional). Moreover, he opined that Hopwood would not have had a diagnosable mental condition were it not for other negative "stressors" in her life. *See Lees-Haley,* vol. 3 at 220-21.

Hopwood has had more than her share of tragedies, both before and after she was denied admission to the law school, all of which have caused her severe emotional distress. Without doubt, the evidence establishes the least traumatic "stressor" in her life was the law school's denial of her application. However, because of the unusual circumstances occurring in Hopwood's personal life from 1992 through 1996 and her mental condition, the Court would find from a preponderance of the evidence that Hopwood has suffered mental anguish damages as a result of the law school's rejection of her application. The denial of admission aggravated Hopwood's preexisting emotional injuries beyond the mere hurt feelings, frustration, and anger that are a part of everyday life. *See Patterson,* 90 F.3d at 940. Accordingly, the Court would find from a preponderance of the evidence that Hopwood has sustained mental anguish damages in the amount of $6,000 as a result of the law school's rejection of her application for admission.

B.

Carvell is the only plaintiff who pursued a law degree in 1992 after his rejection from the law school. Carvell graduated with a joint degree in law and a master's in business administration from Southern Methodist University ("SMU") in 1996. *See Carvell,* vol. 4 at 101. Since August 1996, he has been employed as an attorney with the private law firm of Bickel & Brewer in Dallas, Texas,[75] where he was earning a starting salary of $50,000 plus benefits at the time of trial (Carvell has since earned a pay increase). *See Carvell,* vol. 4 at 105-06, 114-15. Carvell seeks total economic damages in the amount of $705,886, consisting of $40,036 in increased tuition for attending SMU and $668,850 in damages resulting from the diminished value of an SMU law degree.[76] *See* P-478. Additionally, Carvell seeks $1,500,000 in mental anguish damages resulting from the law school's discrimination against him and the denial of his application for admission. *See* P-460.

(1) Tuition Differential

Carvell would have attended the University of Texas over SMU Law School had he been admitted to the law school in 1992. *See Carvell,* vol. 4 at 98; *1994 trial transcript, Carvell,* vol. 10 at 9. Accordingly, the Court finds from a preponderance of the evidence the difference in the cost of tuition between the two schools was $40,036. *See* P-478, Exhibit 2, Table 2; *Ruhter,* vol. 3 at 4.

(2) Damages for Loss of Future Income

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[75]Employment in Dallas by private law firms (with their attendant high starting salaries) is one of the positive benefits of graduating from SMU Law School, as the school purposefully seeks to place its graduates in the Dallas law market.

[76]When specifically questioned by his counsel at the May 1994 trial whether he was claiming any loss in earnings as a result of his rejection by the law school, Carvell explicitly stated he was not. *See 1994 trial transcript, Carvell,* vol. 10 at 9-10.

Ruhter calculated the diminished value of Carvell's degree by comparing the difference in earnings hypothetically available to University of Texas and SMU law graduates based upon the average starting associate salaries of all private law firms that recruited at those two schools in 1995, regardless of whether those firms actually hired graduates of those two law schools that year. *See Ruhter*, vol. 3 at 3; P-478, Exhibit 3, Table 3. Ruhter did not identify any salary differential at the partnership level because he was unaware of any empirical information available to calculate it; therefore, Ruhter analyzed Carvell's alleged lost earnings only as an associate until the year 2003. *See Ruhter*, vol. 3 at 80-81; P-478, Exhibit 3, Table 3. Ruhter testified that the present value of the earnings differential was $11,850. *Ruhter*, vol. 3 at 4. Hildebrandt reviewed the accuracy of the figures contained in Ruhter's report. He testified that Ruhter underestimated Carvell's losses by not carefully analyzing "the weight of the law schools" and by not including any damages for the differential in partnership compensation between graduates of SMU and the law school. Hildebrandt testified these damages were approximately $50,000 per year, for a total of $654,000. *Hildebrandt*, vol. 3 at 110-11.

The Court fails to find from a preponderance of the evidence that Carvell is entitled to any damages for loss of future income; indeed, his requests for economic damages are counterfactual. First, Carvell did not use the Career Services office at SMU to obtain any employment. *See Carvell*, vol. 4 at 122. Consequently, a comparative analysis of the average starting salaries of law firms that recruit at the University of Texas and SMU provides an inappropriate basis for measuring damages in Carvell's case. Second, Ruhter calculates Carvell's lost earnings beginning in mid-1995 even though Carvell did not graduate from law school until May 1996. *See Carvell*, vol. 2 at 122. Third, the "opportunity" differential between SMU and the University of Texas is due in large part to the high starting salaries of national firms and regional boutiques which tend to recruit more heavily at the University of

Texas. In general, these firms only hire top-tier students with very strong academic records. *See Jones,* vol. 4 at 82-84. Carvell, however, graduated in the third quarter of his class at SMU; therefore, these higher earnings probably would not have been available to Carvell because he would not have had an academic record at the University of Texas sufficient to result in recruitment by those firms. *See Carvell,* vol. 4 at 114. Fourth, in requesting $654,000 for the *differential* in partnership compensation, Carvell apparently overlooked the salient fact that he is not on partnership track at Bickel & Brewer.[77] *See Carvell,* vol. 4 at 106.

Carvell proffered speculative evidence that he has suffered lost earnings as a result of not obtaining his degree from the law school. In fact, the evidence suggests Carvell has suffered no loss in earnings: Carvell's starting salary is higher than the average starting salary for graduates of the University of Texas in 1995. *See* D-685, Tab 4 (indicating that the average starting salary for 1995 University of Texas graduates was $49,761); D-685, Tab 8 (indicating that the average starting salary for 1995 SMU graduates was $51,464). Even assuming an earnings differential exists and that it can be quantified to a reasonable degree of certainty--a notion the Court seriously doubts--the statistics regarding average starting salaries in private, government, corporate, and public interest practice suggest the differential actually favors SMU graduates. *See* D-685, Tab 4 & 8. Moreover, Carvell proffered no evidence that private law firms distinguish among lawyers, in terms of salary and/or benefits, on the basis of where they obtained their law degree. True, graduates of highly regarded universities tend to have

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[77]To the extent Carvell implies he might have been considered for partnership track at Bickel & Brewer had he graduated from the University of Texas, that proposition is ridiculous. One of the name partners of that firm is a graduate of SMU Law School, so it is highly unlikely that members of the firm regard SMU law alumni unfavorably. *See Carvell,* vol. 4 at 124; D-653.

enhanced career opportunities over graduates of universities that are not as highly regarded. But, in the Court's opinion, the ability of an individual to succeed in his or her profession depends much more upon the value of that individual rather than the value of his or her degree.[78]

(3) Mental Anguish Damages

Carvell testified he experienced disappointment, anxiety, stress, shock, frustration, and anger and that he became withdrawn from others as a result of his denial of admission to the law school. *See Carvell,* vol. 4 at 98-101; P-472 (deposition testimony of friend confirming these feelings). In his interrogatory responses, Carvell also indicated he suffered feelings of confusion, depression, embarrassment, inability to concentrate, lack of motivation, indecisiveness, diminished confidence, inadequacy, stigmatization, and diminished self-esteem. *See* P-460; P-465. On the other hand, he testified he was not "shattered or crippled" by the experience and that he is functioning well at his current employment. *See Carvell,* vol. 4 at 101. Moreover, Carvell never sought psychiatric or medical treatment for any emotional injuries caused by the defendants' conduct, even though he has suffered from "very serious and substantial mental health problems in the past." *Carvell,* vol. 4 at 101, 119-20; Carvell Stipulation 1.

As with Hopwood, Lees-Haley evaluated Carvell's self-reported complaints to determine the nature and extent of his emotional injuries resulting from the defendants' actions. Lees-Haley stated in his expert report that "Carvell appears to have a chronic, mild depression that pre- existed this injury and continues to the present, which was *temporarily mildly aggravated* by not being admitted to

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[78]In any prestigious area of the law one examines, from top practitioners to Supreme Court Justices, few people know which law school the individual attended, and, presumably, not all such individuals are graduates of the University of Texas.

the University of Texas School of Law and by discovering that he was the subject of race discrimination." *See* P-527 (emphasis added). The Court does not find from a preponderance of the evidence that the denial of admission caused Carvell any compensable emotional injuries, either by themselves or resulting from the alleged temporary aggravation of his preexisting depression. The denial, at most, resulted in the mere hurt feelings, frustration, and anger that are simply a part of everyday life.

C.

Elliot seeks $56,021 in lost earnings he contends resulted from his delayed entry into the workforce as a lawyer during the pendency of this lawsuit. He arrived at this figure by calculating the five-year differential, adjusted for inflation and discounted to present value, between his current salary as a CPA and the average starting salary of 1995 graduates of the law school. The Court does not find from a preponderance of the evidence that Elliot has suffered any loss in earnings as an attorney that can be reasonably attributed to his rejection by the law school. Elliot declined an offer of admission to attend Texas Tech Law School in 1992. *See Elliot*, vol. 3 at 273. Therefore, the delay in his legal education resulted not from the law school's admissions procedures but from Elliot's deliberate choice not to attend Texas Tech. Furthermore, separate from the issue of the remoteness of the injury is the issue of whether Elliot has mitigated his damages. Elliot could have attended Texas Tech in 1992 or he could have applied to other law schools within the last five years. The damages Elliot seeks are also speculative and remote.

D.

Rogers seeks compensatory damages of $332,867.94 plus one third of any amount awarded in attorneys' fees.[79] *See* D-660, Exhibit A. Rogers claims approximately $200,000 in lost wages as a lawyer during the pendency of the lawsuit; roughly half the lost earnings he claims are losses he sustained in unpaid loans he made to his business.[80] In addition, Rogers seeks $200 for the cost of reapplying to the law school, $795 to attend a Princeton Review LSAT course, $950 in costs to move back to Austin in the event the Court orders an injunction, a minority scholarship in the amount of $20,000 plus tuition for three years, and $909.24 in expenses for voluntarily attending a conference on affirmative action in California. The Court does not find from a preponderance of the evidence that Rogers has sustained any economic damages as a result of his rejection by the law school. The reasons are essentially the same for which the Court denied Elliot's request for damages--the damages alleged are not attributable to the defendants' conduct and are speculative and remote. Rogers declined an offer to attend the University of Houston School of Law in 1992. *See Rogers,* vol. 2 at 100. The remaining requests for damages (those that do not relate to Rogers's request for lost earnings) are frivolous and do not merit discussion.

V.

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[79]At trial, Rogers testified he sustained losses of approximately $382,000. *See Rogers,* vol. 2 at 95-96; P-325. Because Rogers failed to supplement his interrogatory responses regarding the extent of his damages as required during discovery, the Court considered only his original request.

[80]This last contention—that the State of Texas should pay for Rogers's poor business judgment—sounds like a bad joke and, perhaps, betrays a lack of analytical skills Rogers will sorely need if he intends to succeed in law school.

Title 42 of the United States Code, Section 1988, provides that a court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Court denied the plaintiffs' original requests for fees and expenses following the May 1994 trial, concluding that the plaintiffs, although prevailing parties under statute, only attained de minimis relief. The plaintiffs separately appealed that judgment on January 9, 1995. On July 26, 1996, the Fifth Circuit granted the plaintiffs' motion to vacate the Court's judgment on attorneys' fees and remanded the case with an instruction to reconsider whether the fees and expenses requested at the trial and appellate levels were reasonable and necessary for the prosecution of this case. The plaintiffs' attorneys purportedly spent 7,241.41 hours litigating this case, and the fees and expenses sought exceed $1.5 million.

At the May 1994 trial, the plaintiffs were represented by (1) Steven Smith; (2) Terral Smith; (3) Joseph Wallace, Paul Harris, R. Kenneth Wheeler, and Scott Wilson of the private law firm of Wallace, Harris & Sims ("WHS"), located in West Virginia; and (4) Michael McDonald, Michael Rosman, Vincent Mulloy, Michael Troy, and Joseph Shea of the Center for Individual Rights ("CIR"), a not-for-profit, public interest law firm located in Washington, D.C. Steven Smith is an Austin sole practitioner who initiated the suit. He was the only attorney representing the plaintiffs during the first eight months of the case. Terral Smith, also a sole practitioner in Austin, conducted the majority of the trial presentation. Along with Terral Smith (although to a lesser degree), Wallace participated in the trial presentation, while the other attorneys of WHS assisted in trial preparation. The CIR's main involvement in the case was to conduct most of the legal research, write all legal briefs, and bankroll the case. Following the 1994 trial, the plaintiffs sought fees and expenses of $853,847.69 for 4,840.56 hours of

work ("trial hours").[81] After the successful appeal of this case, the plaintiffs increased their requests to $941,391.24 to reflect current hourly billing rates.[82]

Beginning in November 1994, the plaintiffs (for reasons unknown to the Court) obtained separate representation on appeal to the Fifth Circuit and the Supreme Court. Hopwood and Carvell were represented by (1) Theodore Olson, Douglas Cox, Thomas Hungar, Walter J. Scott, and Daniel Nelson of the Washington, D.C. office of Gibson, Dunn & Crutcher ("GDC"); and (2) McDonald, Rosman, Troy, and Hans Bader of CIR.[83] Terral Smith and Steven Smith remained counsel of record for Elliot and Rogers. GDC primarily handled the appeal relating to the constitutionality of the law school's use of racial preferences, including briefing the

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[81]The first set of attorneys' fee applications were filed on August 29, 1994. One application was submitted on behalf of Steven Smith, Terral Smith, and WHS. Steven Smith sought compensation for 1,552 hours at $125 per hour plus $164.21 in expenses for a total of $194,164.21. Terral Smith sought compensation for 837.80 hours at $225 per hour for a total of $188,505.00. WHS sought compensation for 1,005.82 hours plus $151.09 in expenses for a total of $171,104.34. The billing rates for WHS ranged from $95 to $200 per hour. The second application, filed on behalf of CIR, sought $235,461.95 in fees for 1,444.94 hours of work and $64,526.19 in expenses, for total compensation of $299,988.14. CIR's rates ranged from $125 to $230 per hour.

[82]In their supplemental requests for attorneys fees filed on October 1, 1996, Hopwood and Carvell argue that the original request for fees should be adjusted in order to compensate for the delay in payment. The adjusted figures are $362,250.19 for CIR (representing current rates of $150 to $280 per hour) and $196,471.84 for WHS (representing a current rate for Wallace at $250 per hour).

[83]WHS did not represent any of the plaintiffs on appeal, but Joseph Wallace (now with the law firm of Harris & Bush) consulted with GDC, CIR, and Terral Smith during the appeal on a limited basis.

issues to both appeliate courts and arguing the case to the Fifth Circuit. CIR worked on the appeals relating to the proposed interventions by several minority groups and this Court's denial of attorneys' fees. In addition, CIR had primary responsibility for coordinating activity among the lawyers representing Hopwood and Carvell. It appears Terral Smith and Steven Smith assisted GDC with the trial record only--their billing records demonstrate they did little independent appellate work and instead relied on GDC to argue the merits of the case to the Fifth Circuit and the Supreme Court. The plaintiffs seek fees and expenses of $614,138.56 for 2,400.85 hours of work during the appellate phase of this case ("appellate hours").[84]

A.

To determine the appropriate award, the Court must calculate the "lodestar" by multiplying the number the number of hours reasonably spent on the litigation by a reasonable hourly billing rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 1939 (1983). The fee applicant bears the burden of establishing that the hours expended and the billing rate are reasonable. *Id.* at 437, 103 S. Ct. at 1941. The Court should consider the factors set forth

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[84]The post-appeal applications were filed beginning in October 1996. One application for attorneys' fees was filed on behalf of CIR, GDC, and Wallace. CIR seeks total compensation of $243,421.68, consisting of $195,897.50 in fees for 909.8 hours, $17,638.56 in expenses, and $29,885.62 in interest. GDC seeks compensation of $287,925.00 in fees for 1,010.5 hours of work and $4,189.87 in expenses for a total of $292,114.87. GDC's hourly rates range from $450 to $275 per hour. Wallace seeks compensation for 18 hours at $250 per hour, plus expenses of $70.30 and interest of $25.50, for a total of $4,595.50. Terral Smith submitted a post-appeal application seeking compensation for 155.8 hours at $225 per hour for a total of $35,055 in fees. Steven Smith's post-appeal application seeks compensation for 306.75 hours at $125 per hour plus $607.76 in expenses for a total of $38,951.51.

in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), to evaluate the reasonableness of the fee requests. *See Walker v. United States Dep't of Housing & Urban Dev.*, 99 F.3d 761, 771 (5th Cir. 1996) (indicating that most of the *Johnson* factors are reflected in the lodestar amount and cannot be used to compute any upward or downward adjustment of the lodestar); *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). The *Johnson* factors are (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Watkins*, 7 F.3d at 457 n.4. As discussed below, the defendants challenge the fees sought for certain categories of work performed by counsel, as well as fees sought for duplicative, unnecessary, and excessive hours. Moreover, the Court made certain discretionary reductions in accordance with the *Johnson* factors.

(1) Public and Media Relations

The defendants argue the plaintiffs are not entitled to reimbursement for time spent dealing with the media. As the defendants correctly contend, the Fifth Circuit routinely denies such requests because they are not related to the litigation of the case. *See id.* at 458; *Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 380 (5th Cir. 1990) (affirming the district court's decision to discount award for time spent preparing press releases); *see also Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 176 (4th Cir. 1994) ("The legitimate goals of litigation are almost always attained in the courtroom, not

in the media."). The plaintiffs urge the Court to apply the standard of recovery announced in *Davis v. San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993), in which the Ninth Circuit held that fees incurred in public relations efforts are recoverable as long as such efforts "contributed, directly and substantially, to the attainment of [the party's] litigation goals." *Watkins*, 7 F.3d at 458 (noting the existence of the *Davis* rule but refusing either to accept it or to reject it). Even applying the *Davis* standard to this case, the Court finds the plaintiffs have not shown that their efforts in the media assisted in the litigation.[85] Instead, the public relations efforts in this case clearly relate to the divisive political--as opposed to legal--issue of affirmative action. *Cf. Rum Creek*, 31 F.3d at 176 (refusing to allow recovery for time spent dealing with the media because those efforts were aimed at rehabilitating the plaintiff's public image). Accordingly, the Court deducts 5.50 trial hours and 68 appellate hours from its award for time spent by counsel in press and television interviews, as well as "reviewing clips" and other actions related to the media, because they were not reasonable and necessary for the prosecution of this case.[86]

(2) Proposed Interventions

The defendants argue the plaintiffs are not entitled to attorneys'

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[85]For instance, the plaintiffs argue they are entitled to such fees because they relied on and cited to press coverage in their motion for attorneys' fees to demonstrate the impact of the results the plaintiffs achieved in the Fifth Circuit. The significance of the Fifth Circuit opinion did not need to be explained to this Court by the media.

[86]The following is the breakdown, by firm and/or attorney, of time spent dealing with the media during the trial phase of the case: Steven Smith (4.50 hours) and Terral Smith (1 hour). The following is the breakdown of the appellate hours: GCD (48.25 hours), CIR (5.90 hours), Terral Smith (7.10 hours) and Steven Smith (6.75 hours).

fees for work related to the failed interventions of the Thurgood Marshall Legal Society, the Black Pre-Law Association, the NAACP Legal Defense Fund, and the Mexican-American Legal Defense and Educational Fund. The Supreme Court has held that a prevailing party in a civil rights lawsuit cannot recover attorney's fees against an intervenor unless the intervention is "frivolous, unreasonable or without foundation." *Independent Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 761, 109 S. Ct. 2732, 2737 (1989). Several circuit courts have read *Zipes* to imply that plaintiffs should bear the risk of incurring intervention-related costs as a result of filing a lawsuit and have therefore extended *Zipes* 's holding to a prevailing party's claims for intervention-related attorneys' fees against a losing defendant. *See Rum Creek*, 31 F.3d at 176-78 ("*Zipes* instructs us not to shift intervention-related expenses to the losing defendant."); *Bigby v. City of Chicago*, 927 F.2d 1426, 1428-29 (7th Cir. 1991) ("*Zipes* indicates that a . . . defendant's fee liability does not presumptively extend to cover fees incurred by plaintiffs in litigating third-party interests . . . ."). In this case, the defendants did not participate in the proposed third-party interventions.[87] Because the plaintiffs are not prevailing

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[87]The extent of the defendants' involvement in the intervention was as follows: On January 10, 1994, the defendants filed a one-sentence response to the proposed intervention in this Court, stating that they "do not object to the intervention." On February 16, 1994, the defendants supported a motion filed by the intervenors in the Fifth Circuit to expedite the appeal of the proposed intervention, stating "Defendants believe that the intervention would be beneficial to an appropriate resolution of the litigation and believe it to be important to resolve the intervention issue expeditiously." On May 3, 1994, the defendants submitted a letter to the Fifth Circuit case manager indicating that they did not oppose intervention and that "the adverse parties in this appeal are the plaintiffs and the potential intervenors." *See* Exhibits 1, 2, and 3, Plaintiffs' Second Supplemental Memorandum in Further Support of Attorneys' Fees, October 11, 1994. On February 1, 1995, the defendants

parties as against the defendants on the issue of intervention, they are not entitled to attorneys' fees for time spent litigating that issue, and the Court deducts 184.90 trial hours and 338.47 appellate hours from its award of fees.[88] *See Bigby,* 927 F.2d at 1429 (holding that the plaintiff could not recover against a defendant that opposed intervention); *Reeves v. Harrell,* 791 F.2d 1481, 1483-84 (11th Cir. 1986) (holding that a plaintiff is not a prevailing party *vis-a-vis* a defendant who remains neutral on issues raised by an intervenor's complaint).

(3) Travel Time

The Court is of the opinion that time spent for travel should not be billed at the same hourly rate sought for active legal work. Accordingly, the number of hours sought for travel time shall be reduced by fifty percent. *See Watkins,* 7 F.3d at 459 (affirming the district court's decision to completely disallow compensation for travel time); *Sun Publ'g Co., Inc. v. Mecklenburg News, Inc.,* 594 F. Supp. 1512, 1520 (E.D.Va. 1984) (reducing fees for travel time by eighty percent) (citing *Younger v. Glamorgan Pipe & Foundry Co.,* 418 F. Supp. 743, 794 (W.D.Va. 1976), *vacated and remanded on other grounds,* 561 F.2d 563 (4th Cir. 1977)). The attorneys

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submitted another letter, this time to the Clerk of the Fifth Circuit, indicating that they did not intend to file a brief on the issue of intervention but reiterating that intervention "would be beneficial to the final resolution" of the case. *See* Exhibit K, Supplemental Appendix, Supplemental Memorandum of Plaintiffs Hopwood and Carvell in support of Attorneys' Fees, October 1, 1996. These actions are insufficient to support the plaintiffs' contention that the defendants participated in the intervention.

[88]The breakdown of trial hours: CIR (127.60 hours), Terral Smith (27.80 hours), WHS (18.75 hours), and Steven Smith (4.75 hours). The breakdown of appellate hours: CIR (302.57 hours), GDC (23 hours), and Terral Smith (12.90 hours).

spent 155.50 trial hours and 36.05 appellate hours traveling, resulting in a discount of 77.75 trial hours and 18.03 appellate hours.[89]

(4) Issues on Remand

The plaintiffs seek compensation for time spent preparing for the April 1997 trial. These time entries begin in mid-July 1996. Because the plaintiffs are not prevailing parties on the issues submitted by the Fifth Circuit on remand, they are not entitled to compensation for those failed efforts. The Court has identified 249.10 appellate hours spent in this endeavor.[90]

(5) Duplicative Work Product and Billing Judgment

In addition to disallowing hours for certain kinds of work altogether, the Court must also consider whether the plaintiffs have adequately eliminated fees sought for duplicative, unproductive, and unnecessary work product. *See Hensley,* 461 U.S. at 432-34, 103 S. Ct. at 1939; *League of United Latin American Citizens v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1232-1233 (5th Cir. 1997) ("*LULAC* "). Moreover, the plaintiffs must exercise proper billing judgment when submitting fee applications.[91] *See Walker,* 99 F.3d

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[89]Travel time during the trial phase of the case is 153.25 hours for WHS, 15.75 hours for Steven Smith, 12 hours for Terral Smith, and 10 hours for CIR. There are 23.50 appellate hours for GDC and 12 .55 appellate hours for CIR relating to travel. The numbers reflected here do not reflect the 50% reduction.

[90]Given the time sequence, these hours were listed in the plaintiffs' supplemental applications for attorneys' fees. These hours will therefore be subtracted from the "appellate hours" calculation. The breakdown for each attorney and/or firm is CIR (151 .10 hours), Steven Smith (52.50 hours), and GDC (45.50 hours).

[91]As evidence of billing judgment, the CIR claims it excluded from its fees application time spent on fundraising, publicity, efforts to obtain

at 769. The Court has very carefully perused the attorney time entries for instances of redundant and wasteful hours. Given the sheer number of attorneys on the case (there were a total of sixteen attorneys involved--eleven at trial and twelve on appeal), there was significant duplication of effort for which the plaintiffs are not entitled to compensation. *See Leroy v. City of Houston,* 906 F.2d 1068, 1079 (5th Cir. 1990) (indicating that hours which result from the case being overstaffed are not hours reasonably expended and should be excluded from the lodestar calculation). Indeed, the lawyers in this case exceeded the plaintiffs by three-to-one even though the legal issues for each plaintiff were identical. Reductions for duplicative work are particularly appropriate in this case because only two attorneys, Terral Smith and Wallace, basically performed the trial presentation, while the bulk of the compensable appellate work was performed by GDC. *See id.* ("[T]here should be no compensation for hours spent in duplicative activity or spent in the passive role of an observer while other attorneys performed.") In addition, although it is the plaintiffs' prerogative to obtain additional representation on appeal, doing so in this case required attorneys for GDC to familiarize themselves with the record and legal issues already known by trial counsel. Finally, the amount of billing in unproductive attorney and client conferences at the trial and appellate levels is somewhat astonishing, especially given the fact that each attorney present at the conference usually billed this time at his full hourly rate. For example, it appears that more than half of the $38,500 in fees Harris submitted relate exclusively to co-

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additional counsel, expenses related to the turnover of attorneys assigned to the case, compensation on behalf of a *pro bono* attorney who conducted a deposition, and fees related to the submission of the fee application. Except for the latter two items, these hours are not compensable. Therefore, the Court does not consider the majority of these exclusions to be evidence of billing judgment. *See Walker,* 99 F.3d at 769-70.

counsel conferences.

The following is a non-exhaustive list of additional examples of redundant and unnecessary work product, as well as a lack of billing judgment: (1) thousands of dollars were spent repeatedly reading and reviewing the same Supreme Court cases on affirmative action; (2) compensation is sought for non-legal work such as reading a national best seller on affirmative action, attending a panel discussion regarding the impact of the case, and reviewing co-counsel agreements; (3) an excessive amount of time was spent reading the defendants' pleadings and reviewing the documents in the case;[92] (4) virtually without exception, the attorneys listed hours spent learning the rules and procedures of the Western District of Texas, the Fifth Circuit, and the Supreme Court; (5) several research projects involved basic civil rights doctrines which should already have been known by counsel, such as the standards of review in equal protection cases; (6) there was excessive research and drafting regarding the issue of Elliot's standing to sue; (7) the attorneys spent hours exhaustively reading, reviewing, and summarizing the deposition testimony of Professor Johanson and Dean Yudof, such as one attorney from CIR who spent 45 hours and $5,625 summarizing Johanson's deposition; (8) there was excessive and inappropriate billing for routine clerical work, organization of files, and data entry which should have been accomplished by non-attorneys; (9) many time entries were inadequately documented under the rules and standards of the Fifth Circuit, particularly by attorneys for GDC, WHS, and Terral Smith, and some of CIR's time entries did not even have a description of

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[92]CIR, for instance, submitted one entry labeled "Read Defendant-Appellee's brief" which the attorney claims took 4.50 hours at a cost of $810.

the work performed;[93] (10) Steven Smith had entries for time spent in relation to three plaintiffs who withdrew from the lawsuit prior to trial; and (11) CIR seeks compensation for Dr. Michael Greve, the founder of CIR and a non-lawyer, for consulting work performed during the trial phase of the case. These charges are inappropriate, and they will not count against the defendants.

It was impractical for the Court to wade through literally hundreds of time entries in order to assess a specific number of duplicative and excessive hours for each attorney. Moreover, "[t]he proper remedy when there is no evidence of billing judgment is to reduce the hours awarded by a percentage intended to substitute for the exercise of billing judgment." *Walker*, 99 F.3d at 770. Therefore, after careful consideration, the Court concludes that a twenty-five percent reduction in the amount of trial hours for Steven Smith, Terral Smith, and WHS is equitable and warranted. The fee application CIR submitted for trial work, however, is another story. The "padding" of attorney hours was quite extensive, not only in the amount of time it took attorneys to complete a particular task but also in the types of tasks the attorneys performed.

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[93]For instance, GDC's records are replete with such time entries as "REVIEW AND REVISE BRIEF," "LEGAL RESEARCH RE 5TH CIRCUIT ISSUES," "REVIEW OF MATERIALS," and "TC W/MR ROSMAN," all of which are simply too vague and brief to inform the Court precisely what work was done. CIR had similar entries, such as "Review Court Filings," as did WHS, which had the following imaginative and informative entries: "Research" and "Trial Preparation." Furthermore, GDC, Terral Smith, CIR, and WHS did not separate the activities for each day and instead lumped all work together under one heading. The Fifth Circuit has specifically and repeatedly denounced such billing practices. *See, e.g., Walker*, 99 F.3d at 773 (calling identical billing practices "woefully inadequate to support any fee application . . . [because] . . . no responsible client would accept [such] records as capable of supporting a bill").

In the Court's opinion, a reduction of thirty-five percent would more accurately reflect the number of hours CIR reasonably spent on litigation.

The percentage reduction for work at the appellate level is a more complex question because, unlike the work performed for trial, the appeal was less of a collective endeavor. Compared to the work performed by GDC, the work performed by CIR, Steven Smith, Terral Smith, and Wallace was of considerably less value to the plaintiffs.[94] In fact, their work on appeal primarily consisted of performing duplicative research, assisting GDC with the trial record, filing notices of appearance, reviewing court decisions, and revising the plaintiff's supplemental applications for attorneys' fees.[95] Therefore, the Court concludes the following reductions in appellate hours are fair and appropriate: a twenty-five percent reduction for GDC and a thirty-five percent reduction for CIR, Steven Smith, and Terral Smith.

(6) Degree of Success

Without question, the plaintiffs attained extraordinary success in the appellate courts. The plaintiffs accomplished the principal goal of the lawsuit--to dismantle all forms of racial preferences in public higher education in Texas. Thus, the Court does not

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[94]Wallace submitted only 18 post-trial hours which primarily consisted of reviewing motions and court orders. These hours were of minimal or no value to the plaintiffs and will be reduced to 3.50 hours, the time he reasonably spent on the plaintiffs' application for attorneys' fees.

[95]Other than the pleadings related to their requests for attorneys' fees, a brief requested by the Fifth Circuit regarding the *Adarand* decision, and two briefs related to the defendants' failed petition for writ of *certiorari*, all of CIR's post-trial filings relate to the intervention attempts. *See* Exhibit J, Supplemental Memorandum in Support of Motion for Attorneys' Fees, Supplemental Appendix (Part I), October 1, 1996.

question the success of the suit at the appellate levels through July 1, 1996, the date the Supreme Court denied the defendants' petition for writ of *certiorari*. *See Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940 ("[T]he fee should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."). However, the plaintiffs did not succeed in one important aspect of their lawsuit--that they were denied admission because of the law school's affirmative action program. The failure of the plaintiffs to obtain specific injunctive and monetary relief is not, in the Court's opinion, a trivial or insignificant matter. *See Albright v. Good Shepherd Hosp.*, 901 F.2d 438, 441 (5th Cir. 1990) (asserting that fees must be apportioned in light of the results obtained). Accordingly, the final fee award for trial level work shall be reduced for each attorney and/or law firm by fifteen percent.

B.

Steven Smith, Terral Smith, and Wallace submitted current hourly rates of $125, $225, and $250, respectively. The current hourly rates submitted by CIR are $280 for McDonald, the president of CIR; $260 for Rosman, CIR's general counsel; $240 for Mulloy; $210 for Shea; $180 for Troy; and $150 for Bader. The current rates for paralegals (CIR used three at trial and six on appeal) is $70 per hour. GDC submitted the following hourly rates for its lawyers: $450 for Olson, a former United States Assistant Attorney General, a partner, and head of GDC's appellate and constitutional law practice group;[96] $275 for Cox, an attorney "of counsel" to firm; $275 for Hungar and Scott, two senior associates with the firm; and $215 for Nelson, a junior associate with the firm.

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[96]The undersigned has been privileged to try lawsuits against some of the most competent trial lawyers in the United States from 1965 to 1991 before taking a seat on the federal bench. The undersigned has never seen a lawyer worth $450 per hour or $4,500 per day--only successful promoters.

The current billing rates for the four GDC paralegals who worked on the appeal range from $75 to $100 per hour. The Court does not have current hourly rates for Harris, Wheeler, Wilson, and the one WHS legal assistant who worked on the case. Their historic hourly rates are $200 for Harris and Wheeler, both partners at WHS; $85 per hour for Wilson, an associate; and $60 per hour for the legal assistant.[97]

(1) Relevant Community

The reasonable hourly billing rate is based on the prevailing market rates in the relevant community--in this instance, Austin, Texas, where the case was tried. *See Blum v. Stenson*, 465 U.S. 886, 895, 104 S. Ct. 1541, 1547 (1984). GDC, CIR, WHS, and Wallace argue, however, that they are entitled to the prevailing market rate for comparable services performed in Washington, D.C. (where GDC and CIR are located) because local counsel was unavailable to take the case. *See National Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317-18 (4th Cir. 1988); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 (7th Cir. 1982) (both holding that outside counsel may be retained when local counsel is unavailable and the plaintiffs have acted reasonably in choosing outside counsel). Several attorneys submitted affidavits with the applications for attorneys' fees indicating that they attempted the locate pro bono assistance from members of the private bar in Texas but, other than Terral Smith, none could be obtained. *See, e.g., Affidavit of Michael McDonald*, August 29, 1994. The plaintiffs' attorneys also assert the complexity of the case and the

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[97]Terral Smith, Wallace, Wheeler, and Olson have over 20 years experience; McDonald, Rosman, and Cox have over 10 years experience; and Steven Smith, Troy, Bader, Shea, Hungar, Scott, and Nelson have less than 10 years experience. The Court was provided with no information regarding the years of experience of Harris, Mulloy, or Wilson.

superior resources of the defendants required the involvement of outside counsel. The Court rejects those arguments and the affidavits. From the inception of this case, there has been a shortage of clients, not lawyers. Steven Smith spent months soliciting clients through the mail, and only seven individuals responded. *See* D-650 (sample solicitation letter). Once Smith was retained, he sought the assistance of CIR because he apparently lacked both the expertise and the funds to try the lawsuit. *See id.* The Court will not assess against the defendants the higher rates of Washington, D.C. because local counsel got in over his head. In addition, Terral Smith provided competent and skilled legal representation in the trial court, and the Court has no doubt he was capable of the same degree of competence regarding the appeal had it been determined he should have remained the plaintiffs' primary lawyer.

(2) Prevailing Market Rate

When the attorney's customary rate fails within the range of hourly fees in the prevailing market for attorneys of similar skill and experience, the Court should consider that rate in setting a reasonable hourly rate; if the Court deviates from the customary rate, the Court must specifically articulate its reasons for doing so. *See LULAC*, 119 F.3d at 1234; *Watkins*, 7 F.3d at 459. Although the hourly fee awarded must be supported by the record and cannot merely reflect the experiences of the Court, *see LULAC*, 119 F.3d at 1234, the Court may consider evidence outside the record, such as the hourly rate given in similar cases in the Western District of Texas, *see Walker*, 99 F.3d at 770. Terral Smith was the only attorney who timely presented evidence regarding the prevailing market rates for comparable services performed in Austin, Texas.[98]

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[98]Steven Smith untimely submitted evidence that the prevailing market rates in Austin range from $123 to $150 per hour for an attorney of his skill and experience. The remaining attorneys only submitted

He indicates that the prevailing market rate for federal court practice in the Western District of Texas is between $220 to $300 per hour (these rates were charged in a case involving the Endangered Species Act). For federal civil rights litigation, Terral Smith indicates that a rate of $225 per hour is reasonable for an attorney of his skills and abilities. *See* Affidavit in Support of Motion for Attorney's Fees, Plaintiffs' Motion for Attorneys' Fees, August 29, 1994. In the Court's experience, most recent fee awards in civil rights cases in the Western District of Texas generally have billing rates ranging from $150 to $200 per hour.[99] The record in this case does not support a billing rate higher than $225 per hour. *See LULAC*, 119 F.3d at 1234.

(3) Assessing the Rates

The hourly rate of $125 requested by Steven Smith appears reasonable given both his limited trial and appellate experience and his role in the case. He was primarily involved in discovery, including document review, responding to the defendants' discovery requests, and participating in discovery disputes. He also performed legal research related to tangential issues in the case,

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evidence of the prevailing market rate in Washington, D.C. and Virginia. WHS's evidence establishes a prevailing market rate for civil rights litigation at $200 per hour. CIR submitted evidence that the prevailing market rates range from $90 to $190 per hour for associates and from $195 to $350 per hour for partners. GDC submitted evidence that hourly rates range from $90 to $230 for associates and $195 to $525 for partners. The rates submitted by CIR and GDC only reflect the general hourly rates charged to clients in Washington, D.C. and do not purport to reflect the market rate for work performed in federal civil rights litigation.

[99]The Court has never granted an application for attorney's fees with a billing rate higher than $200 per hour without the agreement of the parties so stipulating.

such as Hopwood's residency status. As discussed above, he performed little substantive work on the appeal. Furthermore, this rate is higher than Smith's normal billing rate and is the highest rate Smith has ever received in any federal civil rights litigation he has undertaken. Terral Smith's hourly rate of $225 is also reasonable. Given his competence and years of experience, the rate is in line with prevailing market rates for comparable work.

The rates requested by Wallace, CIR, and GDC, however, are excessive. Wallace's rate of $250 runs afoul of the current prevailing market rates in Austin. Wallace's rate for trial level work is therefore reduced to $225, a rate that reflects his role in the trial and his years of experience. As for the time Wallace spent on appeal, the Court concludes that his rate should be reduced to $200 per hour because all of Wallace's compensable post-trial time relates to his application for attorney's fees. As the Fifth Circuit has indicated, an attorney should not command his or her normal billing rate for such work. *See Leroy*, 906 F.2d at 1079 ("Certainly, the base rate for time spent on computing and enforcing attorneys' fees should be less than that allowed for professional services rendered primarily on the merits."). As for Harris and Wheeler, the Court assesses an hourly rate of $200. According to their billing records, their main function was to consult with co-counsel about the case; they performed very little independent work and did not actively participate at trial. The Court concludes an hourly rate $100 for Wilson for the legal research and document review he performed is fair and reasonable.[100]

With respect to CIR, its normal billing rates are excessive given its function at trial and on appeal. Considering the evidence of

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[100]Three other WHS associates (all of whom have rates lower than $100 per hour) performed a total of one hour of work on the case. For the sake of simplicity, the Court will assign this hour of work to Wilson in calculating the lodestar.

prevailing market rates in the record, as well as the Court's experience in these kinds of cases, a rate higher than $200 per hour for any attorney who did not actively participate at the trial (in terms of presenting witness or opening and closing statements) or on appeal (in terms of oral argument) would be unreasonable. Accordingly, an hourly rate of $200 for McDonald and Rosman, the two most experienced CIR lawyers, is appropriate. A rate of $175 per hour is appropriate for Mulloy, Shea, and Troy, the mid-level lawyers, and a rate of $150 per hour is reasonable for Bader, the least experienced lawyer at CIR.

GDC's billing rates are extreme even with respect to the evidence GDC itself offered. For instance, GDC's evidence establishes that no firm in Washington, D.C. charges an hourly rate for associate work over $230, and yet GDC requests that such work be compensated at a rate of $275 per hour. *See Leroy*, 906 F.2d at 1079 ("[T]he hourly rates are to be adequate to attract competent counsel, ... not the rates which lions at the bar may command.") (internal quotations omitted). Indeed, such exorbitant rates are particularly inappropriate when "the experience and special skill of the attorney does not result in the expenditure of fewer hours than counsel would normally be expected to spend." *Id.* The Court assesses a rate of $225 per hour for Olson and Cox, the two most experienced and distinguished lawyers from GDC and the two attorneys who controlled the appeal. The Court finds an hourly rate of $175 for Hungar and Scott and an hourly rate of $150 for Nelson is appropriate in light of their contribution to the case (primarily legal research and assisting with the trial record and the briefs) and their levels of experience.

Finally, rather than assign a specific rate for each paralegal and law clerk from WHS, CIR and GDC who worked on the case, the Court has aggregated the hours for each firm. The Court concludes a reasonable rate for work performed by paralegals and law clerks from GDC is $80 per hour; for WHS and CIR paralegals, a

reasonable rate is $70 per hour.

(4) Compensation for Delay in Payment

In assessing a reasonable rate, the Court considered the attorneys' current hourly rates (as opposed to the historic rates submitted with the 1994 fee applications) in order to compensate for the delay in payment. *See Missouri v. Jenkins*, 491 U.S. 274, 282-84, 109 S. Ct. 2463, 2468-69 (1989) ("[A]n appropriate adjustment for delay in payment--whether by the application of current rather than historic hourly rates or otherwise--is within the contemplation of [§ 1988]."); *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) ("Full compensation requires charging current rates for all work done during the litigation, or by using historical rates enhanced by an interest factor."). Where appropriate (as with Wallace, Shea, Troy, Wilson, and paralegal work), the Court increased the original hourly rate to compensate for the delay in payment. In this case, however, the Court found that many of the requested billing rates were excessive. In those instances, the Court assessed hourly rates which, although lower than the rates requested, are intended to reflect current hourly rates in the prevailing market.

C.

(1) Trial Hours

Table I represents the total hours for which the plaintiffs' are entitled to compensation for hours spent at the trial level, with the appropriate deductions identified in Part V(A) for time spent on public and media relations, the proposed interventions, travel, duplicative work product, and lack of billing judgment. Table II multiplies the hours allowed by the billing rate previously determined by the Court in Part V(B) and takes into account the fifteen percent deduction for the plaintiffs' lack of success in attaining specific injunctive and monetary relief.

TABLE I: TRIAL HOURS					
	Hours Sought	De-ductions	Subtotal	% Re-duction	Total Hours
S. Smith	1552.00	17.13	1534.87	25%	1151.15
T. Smith	837.80	34.80	803.00	25%	602.25
Wallace	479.62	51.38	428.24	25%	321.18
Harris	192.50	28.00	164.50	25%	123.38
Wheeler	93.00	11.50	81.50	25%	61.13
Wilson	139.25	4.50	134.75	25%	101.06
WHS Clerk	101.45	0.00	101.45	25%	76.09
McDonald	119.59	4.80	114.79	35%	74.61
Rosman	516.75	79.40	437.35	35%	284.28
Mulloy	147.25	0.00	147.25	35%	95.71
Troy	336.65	39.00	297.65	35%	74.20
Shea	114.15	0.00	114.15	35%	74.20
CIR Clerks	210.55	9.40	201.15	35%	130.75

TABLE II: LODESTAR CALCULATION					
	Total Hours	Rate/ Hour	Subtotal	% Red-uction	Total
S. Smith	1151.15	$125	$143,893.75	15%	$122,309.69
T. Smith	602.50	$225	$135,506.25	15%	$115,180.31

TABLE II: LODESTAR CALCULATION					
Wallace	321.18	$225	$72,265.50	15%	$61,425.68
Harris	123.38	$200	$24,676.00	15%	$20,974.60
Wheeler	61.13	$200	$12,226.00	15%	$10,392.10
Wilson	101.06	$100	$10,106.00	15%	$8,590.10
WHS Clerk	76.09	$70	$5,326.30	15%	$4,527.36
Mc-Donald	74.61	$200	$14,922.00	15%	$12,683.70
Rosman	284.28	$200	$56,856.00	15%	$48,327.60
Mulloy	95.71	$175	$16,749.25	15%	$14236.86
Troy	193.47	$175	$33,857.25	15%	$28,778.66
Shea	74.20	$175	$12,985.00	15%	$11,037.25
CIR Clerks	130.75	$70	$9,152.50	15%	$7,779.63

Aggregating the individual lodestar amounts of Wallace, Harris, Wheeler, Wilson, and the WHS Clerk results in a total lodestar amount for WHS of $105,909.84. Aggregating the individual amounts of McDonald, Rosman, Mulloy, Troy, Shea, and the CIR Clerks results in a total lodestar amount for CIR of $122,843.70.

(2) Appellate Hours

Table III represents the total hours for which the plaintiffs' are entitled to compensation for time spent on appeal, with the appropriate deductions identified in Part V(A) for hours spent on public and media relations, the proposed interventions, travel, the issues on remand, duplicative work product, and lack of billing

judgment. Table IV multiplies the appropriate number of hours by the billing rate previously determined by the Court in Part V(B).

TABLE III: APPELLATE HOURS					
	Hours Sought	Deductions	Sub-total	% Red-uction	Total Hours
S. Smith	306.75	59.25	247.50	35%	160.88
T. Smith	155.80	20.00	135.80	35%	88.27
Wallace	18.00	14.50	3.50	35%	3.50
McDonald	13.90	3.40	10.50	35%	6.83
Rosman	630.50	269.15	361.35	35%	234.88
Troy	110.00	32.05	77.95	35%	50.67
Bader	26.60	9.00	17.6	35%	11.44
CIR Clerks	191.95	152.25	39.70	35%	25.81
Olson	168.75	30.75	138.00	25%	103.50
Cox	634.00	59.50	574.50	25%	430.86
Hungar	15.75	1.25	14.50	25%	10.86
Scott	17.50	17.50	0.00	25%	0.00
Nelson	102.75	11.75	91.00	25%	68.25
GDC Clerks	71.75	7.75	64.00	25%	48.00

TABLE IV: LODESTAR CALCULATION			
	Total Hours	Rate/Hour	Total
S. Smith	160.88	$125	$20,110.00
T. Smith	88.27	$225	$19,860,75
Wallace	3.50	$200	$700.00
McDonald	6.83	$200	$1,366.00
Rosman	234.88	$200	$46,976.00
Troy	50.67	$175	$8,867.25
Bader	11.44	$150	$1,716.00
CIR Clerks	25.81	$75	$1,935.75
Olson	103.50	$225	$23,287.50
Cox	430.88	$225	$96,948.00
Hungar	10.88	$175	$1,904.00
Scott	0.00	$175	0.00
Nelson	68.25	$150	$10,237.50
GDC Clerks	48.00	$80	$3,840.00

Aggregating the individual lodestar amounts of McDonald, Rosman, Troy, Bader, and the CIR Clerks results in a total lodestar amount for CIR of $60,861.00. Aggregating the individual amounts of Olson, Cox, Hungar, Scott, Nelson, and the GDC Clerks results in a total lodestar amount for GDC of $136,217.00.

D.

The plaintiffs do not request a multiplier of the lodestar, *see*

Plaintiffs' Motion for Attorneys' Fees, August 29, 1994, and the Court does not believe adjustment of the lodestar is warranted. This case involved extensive discovery and has spanned over five years. The legal issues, however, were neither novel nor extraordinarily difficult, as there have been many significant challenges to affirmative action since *Bakke*, both in and out of the context of higher education. Perhaps the most difficult aspect of this case was the comprehensive marshaling and analysis of equal protection case law in the context of affirmative action. The Court is confident, however, that the difficulties of the case are accurately reflected in the lodestar amount.

The Court realizes that, at first blush, the reductions may seem excessive. Frankly, that impression is due to the sloppy state of most of the fee applications and the considerable overstaffing of this case, both of which necessitated significant reductions by the Court. In fact, the fee applications submitted by GDC, WHS, and Terral Smith were so vague and uninformative the Court seriously considered not awarding attorneys' fees to those individuals at all. In any event, the Court conducted its own calculations regarding the number of hours it should have taken to prepare, try, and appeal this case. Based on an evaluation of the work performed by counsel, the undersigned's thirty years of trial experience, and the *Johnson* factors, the Court concludes that the lodestar is a fair estimate of an appropriate fee award. A single law firm spending an average of fifty hours per week for an entire year could have easily prepared the case and tried it. Had the same law firm handled the appeal, the case could have been prepared and argued to the Fifth Circuit and the Supreme Court in less than six hundred hours (an average of forty hours per week for fifteen weeks). Assuming an average rate of $200 per hour at trial and $225 per hour on appeal, the case should have cost around $650,000. The lodestar exceeds that amount by over $50,000.

E.

The defendants object to the expenses sought in this case associated with the plaintiffs' opposition to the proposed interventions and the costs relating to the involvement of outside counsel to try the case.[101] These expenses include travel expenses, lodging, phone calls, mailing expenses, and Fifth Circuit fees relating to the appeal of the motions to intervene. The Court agrees these charges are inappropriate under § 1988 and makes a resulting deduction of $19,475.09 in CIR's first fee application. As for the post-appeal applications, the Court was able to identify $246.25 spent by GDC in relation to NEXIS searches; presumably, these expenses relate to GDC's efforts with the media and therefore are not recoverable. CIR's post-appeal records specifically label $955.70 spent on "public relations" which the Court will likewise exclude. However, given the general nature of the research, printing, mailing, and traveling expenses submitted by CIR, it was impossible for the Court to assess a specific dollar amount to be excluded from CIR's post-appeal fee application. Therefore, the Court reduces all such expenses by fifty-five percent as a reasonable approximation of the costs related to opposing the intervention attempts. The Court also deducts $18.72 from Steven Smith's application for charges incurred after July 1996, which charges presumably relate to the issues on remand.

Tables V and VI represent the amount of expenses requested by the plaintiffs in the trial and appellate levels of this case, respectively, with the appropriate deductions made in accordance with the paragraph above. The interest is calculated using the prime rate to compensate the plaintiffs for the delay in payment. *See Alberti v. Klevenhagen*, 896 F.2d 927, 938 (5th Cir.) ("[T]he

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[101]The defendants also object to over $7,000 for the deposition costs and travel expenses related to the plaintiffs' expert witness at trial. Under § 1988(c), it is within the Court's discretion to include such expenses as part of a reasonable attorney's fee for cases brought pursuant to § 1981. 42 U.S.C. § 1988(c). The Court declines to deduct this expense.

appropriate rate of interest to be used in compensating a delay in payment adjustment is the cost of borrowing money, the prime rate."), *vacated in part on other grounds*, 903 F.2d 352 (5th Cir. 1990). The interest in Table V is calculated from August 29, 1994, the date the plaintiffs filed their initial applications for attorneys' fees, until the date of this order. The interest in Table VI is calculated from October 1, 1996, the date the plaintiffs filed their supplemental applications for attorneys fees, until the date of this order.[102]

TABLE V: TRIAL EXPENSES AND INTEREST					
	Expenses Sought	Ded-uctions	Subtotal	Int-erest Rate	Total
S. Smith	$164.21	$0.00	$164.21	8.47%	$214.05
WHS	$151.09	$0.00	$151.09	8.47%	$196.96
CIR	$64.526.19	$19,475.09	$45,051.10	8.47%	$58,724.49

TABLE VI: APPELLATE EXPENSES AND INTEREST					
	Expenses Sought	Ded-uctions	Subtotal	Int-erest Rate	Total

[102]The Court derived the prime rate from a booklet entitled "Selected Interest Rates" published by the Board of Governors of the Federal Reserve System. For the sake of simplicity, the Court applied the average prime rate per annum (simple) for the relevant time period rather than applying a different prime rate for each quarter.

TABLE VI: APPELLATE EXPENSES AND INTEREST					
S. Smith	$607.76	$18.72	$589.04	8.38%	$663.08
Wal-lace	$70.30	$0.00	$70.30	8.38%	$79.14
CIR	$17,638.56	$10,131.27	$7,507.29	8.38%	$8,450.96
GDC	$4,189.87	$246.25	$3,943.62	8.38%	$4,439.34

F.

Table VII represents the final calculation of total fees, expenses, and interest the Court awards in this case for each lawyer and/or law firm.

TABLE VII: TOTAL FEES, EXPENSES, AND INTEREST			
	Trial Fees & Expenses	Appellate Fees & Expenses	TOTAL
S. Smith	$122,523.74	$20,773.08	$143,296.82
T. Smith	$115,180.31	$19,860.75	$135,041.06
WHS	$106,106.80	$0.00	$106,106.80
Wallace	$0.00	$779.14	$779.14
CIR	$181,568.19	$69,311.96	$250,880.15
GDC	$0.00	$141,656.34	$141,656.34
TOTAL	$525,379.04	$251,381.27	$776,760.31

The plaintiffs shall have post-judgment interest of 5.407% to be calculated from the date of the judgment to the date of the payment of the judgment. The rate of interest is based on the average investment rate (equivalent coupon issue yield) according to the auction of the 52-week Treasury Bills by the United States Department of the Treasury.

VI.

The outrageous requests for damages made by three of the plaintiffs in this case illustrate the significant financial risks federally funded state universities face when routine admissions decisions are challenged. To the extent minority and nonminority applicants share similar test scores—in which case subjective judgments will always inform the admissions process--there is the risk that the rejected applicant will blame his or her nonadmission on race and sue for damages in court. In the end, the determination of who deserves an offer of admission and who does not is left in the less-than-capable hands of people outside the academic arena—judges. Moreover, the specter of large compensatory damage awards could threaten to compromise the integrity of the admissions process itself. Public universities deserve the freedom to make the necessarily difficult choices regarding admission, and part of that endeavor entails not only consideration of the individual applicant but also the needs of higher education in general and the educational institution and class in particular. This case certainly does not make these serious responsibilities any easier.

SIGNED on this the 20th day of March 1998.

/s/ Sam Sparks
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHERYL J. HOPWOOD,	§	
DOUGLAS W. CARVELL,	§	
KENNETH R. ELLIOTT,	§	
and DAVID A. ROGERS,	§	
Plaintiffs,	§	
VS.	§	**No. A 92 CA 563 SS**
THE STATE OF TEXAS;	§	
UNIVERSITY OF TEXAS	§	
BOARD OF REGENTS;	§	
BERNARD RAPOPORT,	§	
ELLEN C. TEMPLE,	§	
LOWELL H. LEBERMANN, JR.,	§	
ROBERT J. CRUIKSHANK,	§	
THOMAS O. HICKS, ZAN W.	§	
HOLMES, TOM LOEFFLER,	§	
MARIO E. RAMIREZ, and	§	
MARTHA E. SMILEY,	§	
as members of the Board,	§	
in their official capacities;	§	
UNIVERSITY OF TEXAS AT	§	
AUSTIN; ROBERT M. BERDAHL,	§	
President of the University of	§	
Texas at Austin in his official	§	
capacity; UNIVERSITY OF	§	
TEXAS SCHOOL OF LAW;	§	
MARK G. YUDOF, Dean of the	§	
University of Texas School of Law	§	
in his official capacity;STANLEY	§	
M. JOHANSON, Professor of Law	§	
in his official capacity,	§	
Defendants.	§	

JUDGMENT

BE IT REMEMBERED on the 20th day of March 1998 the Court entered its memorandum opinion consisting of its findings of fact and conclusions of law in the above-captioned matter and, consistent with those findings and conclusions, enters the following judgment:

IT IS ORDERED, ADJUDGED, and DECREED that the plaintiffs Cheryl J. Hopwood, Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers have judgments of and against the University of Texas at Austin in the amount of One Dollar ($1.00) each, and further that the University of Texas at Austin as the University of Texas School of Law and its officers in their official capacities are hereby enjoined from taking into consideration racial preferences in the selection of those individuals to be admitted as students at the University of Texas School of Law.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the plaintiffs Cheryl J. Hopwood, Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers TAKE NOTHING further in their causes of action against the defendants the State of Texas; the University of Texas Board of Regents; Bernard Rapopart, Ellen C. Temple, Lowell H. Leberman, Jr., Robert Cruikshank, Thomas O. Hicks, Zan W. Holmes, Jr., Tom Loeffler, Mario E. Ramirez, and Martha E. Smiley, as members of the Board of Regents in their official capacities; and Robert M. Berdahl, in his official capacity as President of the University of Texas at Austin.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the plaintiffs shall have and recover against the University of Texas at Austin the sum of $703,992.29 in attorneys' fees; costs in the amount of $58,135.50 incurred as of August 29, 1994, which includes an interest rate of 8.47 percent per annum (simple) from August 29, 1994, to the date of this judgment; and costs in the amount of $13,632.52 incurred as of October 1, 1996, which includes interest of 8.38 percent per annum (simple) from October 1, 1996, to the date of this judgment, for which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this judgment shall bear interest of 5.407 percent from the date of this judgment until paid.

IT IS FINALLY ORDERED, ADJUDGED, and DECREED that all other relief requested by any party herein is DENIED as this is a final judgment.

SIGNED on this the 20th day of March 1998.

/s/ Sam Sparks
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50506

CHERYL J. HOPWOOD; ET AL,
Plaintiffs,

CHERYL J. HOPWOOD,
Plaintiff-Appellant-Cross-Appellee,

versus

STATE OF TEXAS; BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM; LARRY R. FAULKNER, President of the University of Texas at Austin in his official capacity; UNIVERSITY OF TEXAS SCHOOL OF LAW; M. MICHAEL SHARLOT, Dean of the University of Texas School of Law in his official capacity; STANLEY M. JOHANSON, Assistant Dean in his official capacity; THE UNIVERSITY OF TEXAS AT AUSTIN,
Defendants-Appellees-Cross-Appellants-Cross-Appellees.

DOUGLAS CARVELL; ET AL,
Plaintiffs,

DOUGLAS CARVELL,
Plaintiff-Appellant-Cross-Appellee

and

KENNETH ELLIOTT; DAVID ROGERS,
Plaintiffs-Appellees-Cross-Appellants,

versus

STATE OF TEXAS; REGENTS OF THE UNIVERSITY OF

TEXAS SYSTEM; RITA CROCKER CLEMENTS; DONALD L. EVANS; PATRICK C. OXFORD; A.W. RITER, JR.; A.R. SANCHEZ; WOODY L. HUNT; CHARLES MILLER; RAUL R. ROMERO; TOM LOEFFLER, as members of the Board, Defendants-Appellees-Cross-Appellants-Cross-Appellees.

Appeal from the United States District Court
for the Western District of Texas.

December 21, 2000

Before WIENER and STEWART, Circuit Judges, and LITTLE, District Judge*

WIENER and CARL E. STEWART, Circuit Judges:

This higher education, reverse racial discrimination case is before us on appeal for the third time. The first appeal ("*Hopwood I*") was interlocutory and affirmed the district court's denial of intervention sought by several minority rights advocacy organizations.[1] The second appeal ("*Hopwood II*") followed the district court's judgment on the merits ("*Hopwood A*")[2] of the individual claims of Plaintiffs- Appellants-Cross-Appellees, Cheryl J. Hopwood and Douglas Carvell, and Plaintiffs-Appellees-Cross-Appellants, Kenneth Elliott and David Rogers (collectively, the "Plaintiffs"), against Defendants-Appellees-Cross-Appellants-Cross-Appellees, The University of Texas at Austin (the

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*District Judge of the Western District of Louisiana, sitting by designation.

[1] *Hopwood v. Texas*, 21 F.3d 603 (5th Cir.1994) ("*Hopwood I*"), aff'g *Hopwood v. Texas*, No. Civ. A-92-CA-563-SS, 1994 WL 242362 at *1 (W.D. Tex. Jan.20, 1994).

[2] *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) ("*Hopwood A*").

"University"), the University of Texas School of Law (the "Law School"), and the State of Texas, the Board of Regents of the University and its President, and the Dean and the Assistant Dean of the Law School (collectively, "Texas"), grounded in the denial of the Plaintiffs' admission to the Law School.[3] Now, in "*Hopwood III*," each of the parties either appeals or cross-appeals one or more of the district court rulings made at the conclusion of an extensive bench trial[4] conducted pursuant to our remand from *Hopwood II*. As a broad generalization, three areas dealt with by the district court in *Hopwood B* are implicated in this appeal: That court's (1) ultimate finding of fact that none of the Plaintiffs had a realistic chance of being offered admission to the Law School in 1992, even under a constitutionally valid, race-blind admissions program; (2) rulings on attorneys' fees; and (3) grant of an injunction prohibiting any consideration of race whatsoever in the Law School's admissions process. In addition, Texas would have us disregard the law of the case doctrine and reverse the prior panel's decision in *Hopwood II*. We set forth below our reasons for affirming (1) the district court's factual findings that the Plaintiffs would not have been offered admission in 1992 under a race-blind system, and (2) that court's awards of attorneys' fees. We also express our reasons for declining to reconsider the substance of *Hopwood II*, and for reversing the court's injunction against any consideration of race in the Law School's admission process and remanding that issue for further consistent proceedings.

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[3] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied* 518 U.S. 1033 (1996) ("*Hopwood II*").

[4] *Hopwood v. Texas*, 999 F. Supp. 872 (W.D. Tex. 1998) ("*Hopwood B*").

I.

FACTS AND PROCEDURE

In *Hopwood A*, the case underlying the *Hopwood II* appeal, the district court held that the Plaintiffs had failed to establish by a preponderance of the evidence that they would have been offered admission to the Law School under a constitutional admissions system.[5] On appeal, a panel of this court held that, under the burden-shifting scheme of *Mt. Healthy City School District Board of Education v. Doyle*,[6] the Law School must bear the burden of proving by a preponderance of the evidence that, even under a race-blind admissions system, the Plaintiffs would not have been offered admission.[7] The *Hopwood II* panel[8] stated that, "[i]n the event that the law school is unable to show (by a preponderance of the evidence) that a respective plaintiff would not have been admitted to the law school under a constitutional admissions system, the court is to award to that plaintiff any equitable and/or monetary relief it deems appropriate."[9]

In the spring of 1997, following remand from *Hopwood II*, the district court conducted a four-day bench trial. The Law School called one expert witness on the question of causation, i.e., what caused the Plaintiffs to be denied admission in 1992 and whether they would have been offered admission under a race-blind system.

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[5]*Hopwood A*, 861 F. Supp. 551 (W.D. Tex. 1994).

[6]429 U.S. 274 (1977).

[7]*See Hopwood II*, 78 F.3d at 956-57.

[8]As Judge Wiener specially concurred in *Hopwood II*, differing with portions of the panel majority's reasoning and parts of its judgment, references in this opinion to the holdings of the "panel" in *Hopwood II* do not always reflect those of a unanimous panel.

[9]*Id.* at 957.

That witness was Professor Olin Guy Wellborn, a faculty member of the Law School. He presented both a primary report and a supplemental report analyzing whether the Plaintiffs would have been admitted under a constitutional, race-blind admissions system, concluding that none of the four plaintiffs would have been. After considering Professor Wellborn's reports and testimony, as well as the testimony of several members of the Law School's admissions committee and the Plaintiffs themselves, the district court found that the Law School had proved by a preponderance of the evidence that none of the Plaintiffs would have been admitted to the law school under a constitutional admissions system.[10]

The district court nevertheless proceeded to make alternative factual findings and legal conclusions on the issue of damages. These would only be used in the event that the Plaintiffs should be successful in an appeal--this appeal--of the trial court's causation findings.[11] Finally, the district court entered a permanent injunction prohibiting any consideration of race, for any purpose, in the Law School's admissions process.

Following the initial trial of this action in *Hopwood A*, the Plaintiffs had requested an award of attorneys' fees pursuant to 42

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[10]*Id.* at 879.

[11]In these conditional damages findings, the court concluded that (1) each Plaintiff would be entitled to one dollar in nominal damages, *id.* at 923; (2) Hopwood would not be entitled to any economic damages but would be entitled to $6,000 for mental anguish, *id.* at 906, 908; (3) Carvell would be entitled to $40,036 in economic damages, being the difference between the tuition at the Law School and the tuition at Southern Methodist University where Carvell attended law school, *id.* at 909; but that Carvell did not suffer any compensable emotional injuries, *id.* at 910; and (4) Rogers and Elliott would not be awarded any economic damages, *id.* at 910-11.

U.S.C. § 1988.[12] The district court denied the request, finding that the Plaintiffs, "although prevailing parties under the statute, only attained de minimis relief."[13] When the adverse rulings in *Hopwood A* were appealed to us, we reversed and remanded the attorneys' fees issue with instructions for the district court to award reasonable attorneys' fees.[14] Before the commencement of the *Hopwood B* bench trial on remand, the district court entertained supplemental applications for attorneys' fees and made its final decision on the issue in the memorandum opinion resolving the matters raised at that trial.[15]

The Plaintiffs sought $853,847.69 for their counsel in payment for 4,840.56 hours of work related to the May, 1994 trial of *Hopwood A*. They also asked for $614,138.56 for their counsel in payment for 2400.85 hours of work related to the appellate phase of this litigation. The district court denied the portions of the fee request for time spent on (1) public and media relations, (2) opposing the attempted interventions by the Thurgood Marshall Legal Society, the Black Pre-Law Association, the NAACP Legal Defense Fund, and the Mexican-American Legal Defense and Educational Fund, and (3) any legal work done after our remand in *Hopwood II* because the Plaintiffs were not prevailing parties as to any issues resolved after that remand. The court reduced the number of hours spent for travel by one-half to reflect its judgment that travel should be billed at a lower rate than active legal work, and reduced all hours submitted by the Plaintiffs' counsel by

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[12]*See Hopwood B*, 999 F. Supp. at 911.

[13]*See id.*

[14]*Hopwood v. Texas*, No. 95-50062 (5th Cir. May 17, 1996) (order vacating judgment denying attorneys' fees and remanding with instructions that reasonable attorneys' fees should be granted).

[15]*Hopwood B*, 999 F. Supp. at 923-24.

twenty-five percent to account for duplicative work product and lack of billing judgment.[16] The court then reviewed current billing rates for each of the Plaintiffs' counsel[17] and reduced all submitted rates for the stated purpose of bringing those rates more into line with the prevailing legal market rate in the Austin, Texas trial venue. After multiplying the adjusted number of hours by the adjusted hourly rates, the district court arrived at tentative fee awards for each of the Plaintiffs' counsel. It then reduced the tentative awards for the trial attorneys by fifteen percent to reflect the lack of success in obtaining any injunctive or monetary relief for the Plaintiffs individually. The court concluded its task with numerous tables displaying the relevant calculations.[18] This appeal followed.

II.

ANALYSIS

A. *Admission to the Law School*

1. *Standard of Review*

The district court's determination that the Plaintiffs would not have been admitted to the Law School under a constitutional admissions system is a question of fact, which we review for clear

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[16]The district court reduced the Center for Individual Rights' hours by thirty-five per cent, finding its "padding" to be worse than that of the others.

[17]The district court used current rates to compensate for delay in payment.

[18]*See Hopwood B.*, 999 F. Supp. at 919-23.

error.[19] We review *de novo* whether the district court faithfully and accurately applied our instructions on the burden of proof on remand from *Hopwood II*.[20] We review for clear error the district court's weighing of the evidence in light of the burden of proof.[21]

2. *Burden of Proof*

The *Hopwood II* panel noted that, even though as a general rule plaintiffs seeking money damages must bear the burden of proving that they have been injured, there can be a shift of burden on proof of discrimination.[22] That panel concluded that the *Mt. Healthy* methodology is appropriate in this case, and that under that methodology's burden-shifting minuet, the Law School should have a chance to prevail by showing, through a preponderance of the evidence, that it would have reached the same admission decisions even in the absence of unconstitutional conduct.[23] The *Hopwood II* panel stated that " [i]n the event that the law school is unable to show (by a preponderance of the evidence) that a respective plaintiff would not have been admitted under a constitutional admissions system, the court is to award that plaintiff any equitable and/or monetary relief it deems appropriate."[24]

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[19]*See, e.g., East Jefferson Coalition for Leadership and Development v. Parish of Jefferson,* 926 F.2d 487, 491 (5th Cir. 1991) (finding that the district court's determination of whether preconditions for a claim under the Voting Rights Act had been satisfied was a question a fact to be reviewed for clear error).

[20]*See Odom v. Frank,* 3 F.3d 839, 843 (5th Cir.1993) (concluding that in an appeal from a bench trial, we review issues of law *de novo*).

[21]*Id.*

[22]*Hopwood II,* 78 F.3d at 956.

[23]*Id.* at 956-57.

[24]*Id.* at 957.

The Plaintiffs argue that on remand the district court failed to follow the *Hopwood II* panel's instructions on burden of proof, pointing to, among other things, the district court's criticism of the panel's instruction to use the *Mt. Healthy* burden-shifting methodology. The Plaintiffs insist that if the district court had followed the panel's instructions faithfully by requiring the Law School to carry the burden of proof, Texas could not have prevailed because the burden was "impossible" to carry. We disagree.

First, even though the district court did express its disagreement with our instruction to apply the *Mt. Healthy* analysis,[25] there is no indication from the record that, despite having voiced its criticism, the district court failed to follow the panel's instructions. The court proclaimed that "[t]he Court is cognizant, however, of the panel's instructions on remand, *and it will faithfully and responsibly execute them.*"[26] Our review of the record demonstrates that in fact the court did faithfully and responsibly apply the *Mt. Healthy* burden as instructed. The Law School put forth plenteous evidence in the form of Professor Wellborn's expert reports, as well as affidavits and testimony from admissions committee members, in

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[25]The district court included a lengthy discussion of its own views on the applicability of the *Mt. Healthy* analysis. *See Hopwood B*, 999 F. Supp. at 883-885. It observed that, among other things, the panel's analysis was incomplete because it presupposed that race was a substantial or motivating factor in every denial of a nonminority candidate's application for admission, regardless of the applicant's qualifications. *Id.* at 883. The district court noted that mathematically this could not be true: Even if all 96 offers of admission made to minorities had been made to nonminorities, approximately 1400 nonminority applicants would still have been denied admission. *Id.* Therefore, said the court, only 7 percent of resident nonminority applicants were affected by the Law School's use of racial preferences. *Id.*

[26]*Id.* at 884-85 (emphasis added).

support of the proposition that the Plaintiffs would not have been admitted to the Law School in 1992 under a race-blind admissions procedure. In sum, the district court expressly disagreed with our remand instructions regarding application of *Mt. Healthy* but it clearly followed them.

Next, the Plaintiffs argue that if the district court had faithfully applied the *Mt. Healthy* burden-shifting analysis, it would have had to find that the burden was "impossible" for the Law School to carry. The Plaintiffs note that in his original 1994 judgment, *Hopwood A,* the same district judge stated that "it is virtually impossible to establish the outcome of a comparison of the plaintiffs' applications against the other applicants, whether minority or nonminority."[27] The Plaintiffs also refer us to statements by several of the Law School's administrators and admissions committee members voicing the opinion that to determine whether a candidate would have been admitted under a race-blind system would require starting the admissions process over and reexamining every file.

We do not share the Plaintiffs' interpretation of the *Hopwood II* instructions. That opinion merely requires that the Law School carry its burden using "a constitutional admissions system."[28] Nowhere does it state that the Law School must replicate the 1992 admissions process in its entirety or that review of every file is required if the Law School were to meet its proof burden. Furthermore, we find no jurisprudential support for the proposition that a defendant must employ any particular evaluation system or method to carry its burden of proof in a discrimination case. Statements by Law School officials recognized that recreating the 1992 process would have been extremely difficult. Moreover,

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[27] *Hopwood A,* 861 F. Supp. at 582 n. 86.

[28] *Hopwood II,* 78 F.3d at 957.

because doing that was not mandated by *Hopwood II* or by precedent, the district court on remand did not err in allowing the Law School to try to meet its burden of proof through the demonstrated application of a hypothetical system free of racial preferences. In other words, the district court committed no error by allowing the Law School to attempt to meet its *Mt. Healthy* burden without replicating the 1992 admissions process.

3. *Admission Under a Race-Blind System*

a. *1992 Admissions Procedure*

To evaluate the quality of Professor Wellborn's testimony, we must start with an understanding of the admission procedure that was employed by the Law School in 1992, when the Plaintiffs applied. In that year, the Law School received 4,494 applications for approximately 500 available seats. Initially, each application was assigned to one of the three administrative categories, based solely on the applicant's Texas Index ("TI") score. The TI score is determined independently by the Law School Data Assembly Service ("LSDAS") using the applicant's undergraduate grade point average ("GPA") and Law School Admissions Test ("LSAT") score. The three categories were (1) presumptive admit, (2) discretionary zone, and (3) presumptive deny.

The TI scores needed for placement in the various categories were lower for minority[29] applicants than for nonminority applicants. Professor Stanley Johanson chaired the admissions committee in 1992 and had sole responsibility for setting the cutoff scores for the three categories. In 1992, these cutoff scores were adjusted several times to increase the number of presumptive admits. By March 1992, Professor Johanson had set the presumptive admit threshold for nonminority applicants at a TI

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[29]The term "minority" as used in the Law School's admissions procedure refers only to African Americans and Mexican Americans.

score of 199 and the presumptive denial ceiling for those applicants at 192.[30] All applicants with scores between 192 and 199 went into the discretionary category. For minority applicants, however, the presumptive admit threshold was 192 and the presumptive denial ceiling was 179.[31] Once an application had been placed in one of the three administrative categories, it was subject to different procedures for determining whether admission would be offered.

i. Presumptive Admits

The file of a presumptive admit application would be reviewed by Professor Johanson to ensure that the TI score was not artificially inflated by a high GPA from a noncompetitive college or university or by a noncompetitive major.[32] Any presumptive admit applicants whom he found to have "questionable files" were lowered to the discretionary zone for further review.[33] The rest of the applicants in the presumptive admit category were offered admission by Professor Johanson without consultation with other members of the admissions committee.[34]

ii. Discretionary Zone

The nonminority applications in the discretionary zone were separated into groups of thirty, and each group was then reviewed by three members of the admissions committee.[35] Each group's three committee members would independently review every file

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[30] *Hopwood B*, 999 F. Supp. at 880 (citation omitted).

[31] *Id.* (citation omitted).

[32] *Id.* (citation omitted).

[33] *Id.* (citation omitted).

[34] *Id.* (citation omitted).

[35] The admissions committee in 1992 included nine professors, two assistant deans, and four students. *Hopwood B*, 999 F. Supp. at 879.

in that group of thirty. Each committee member could vote to offer admission to approximately nine of the thirty applicants whose files that he or she reviewed. Applicants in the discretionary zone who received either two or three favorable votes were offered admission; those who received one favorable vote were placed on the waiting list; and those who received no favorable votes were turned down.

iii. Minority Applicants

Three members of the admissions committee served on a special minority subcommittee that reviewed the files of all minority applicants in the discretionary zone.[36] This subcommittee would identify minority applicants whom they deemed to be strong candidates for admission and would prepare summaries of each for review by the full admissions committee.

iv. The Plaintiffs

Plaintiff Hopwood had a TI score of 199. She had been graduated from California State University-Sacramento with a GPA of 3.8 and an LSAT score in the 83rd percentile and had received an associate's degree in accounting from Montgomery County Community College. Hopwood's TI score of 199 placed her in the presumptive admit category; however, after reviewing her file, Professor Johanson downgraded her application to the discretionary zone, concluding that her GPA was inflated by the noncompetitive nature of her community college and undergraduate university.[37] On review by three members of the admissions committee, Hopwood received one vote. This one vote, cast by Assistant Dean Laquita Hamilton, put Hopwood on the waiting list,[38] from which

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[36] *Id.* at 880.

[37] *Id.* at 881.

[38] In 1992, there were separate waiting lists for minority and nonminority applicants.

she was ultimately denied admission.

Plaintiff Carvell had a TI score of 197, which placed him in the discretionary zone. Carvell had been graduated from Hendrix College in Arkansas with a degree in political science and a GPA of 3.28. He took the LSAT twice, scoring in the 61st percentile the first time, and in the 91st percentile the second time. His 197 TI score reflects only the second, higher LSAT score;[39] when averaged, his LSAT score would have placed him in the 76th percentile. Carvell received one vote for admission from a student member of the admissions committee, presumably placing him on the waiting list, from which he never received an offer of admission.

Plaintiff Elliott also had a TI score of 197, placing him in the discretionary zone. He had been graduated from the University with a bachelor's degree in accounting. He had a GPA of 2.98 and scored in the 95th percentile on his LSAT, but received no votes for admission. This resulted in his automatic denial of admission.

Plaintiff Rogers also had a TI score of 197 which placed him in the discretionary category. He had been graduated from the University of Houston-Downtown (UH-D) with a degree in professional writing. Before attending UH-D, he had attended the University, where he was placed on academic probation once and dismissed twice for failing grades. Rogers's GPA at UH-D was 3.13 and his LSAT was in the 94th percentile, but he received no votes for admission.

The median GPA for all students entering the Law School from the 1992 admissions process was 3.52 and the median LSAT score was in the 89th percentile. The Law School offered admission to 637 Texas residents, of which 541 were nonminority applicants and

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[39] *Id.* at 881 n.18.

96 were minority applicants.[40]

b. *Expert Report and Testimony*

The Law School proffered Professor Wellborn as an expert witness on the question whether the Plaintiffs would have been admitted to the Law School under a race-blind admissions procedure. Professor Wellborn is a tenured faculty member of the Law School and has served on the admissions committee since 1979, having chaired it in 1992. As the foundation for his trial testimony, Professor Wellborn presented a long and comprehensive expert report which was followed by a supplemental expert report.

i. *Primary Report*

In his primary report, Professor Wellborn analyzed the way that the 1992 admissions procedure operated with respect to nonminority candidates. He then demonstrated how that procedure, if extended to all candidates, would yield the same total number of admission offers under a race-blind system. Professor Wellborn also explained the relationship between the TI scores and offers of admission to resident nonminority applicants, concluding that 89 percent of such applicants with Hopwood's TI score of 199 were admitted. He also showed that, of all candidates with a TI score of 197 (as achieved by Carvell, Elliott, and Rogers), only 59 percent were admitted. Professor Wellborn then determined that if this exact procedure were used for all 1992 applicants, regardless of race or ethnicity, too few offers would have been forthcoming. Consequently, he lowered the presumptive admit threshold from 199 to 198 and determined that 90 percent of the applicants with TI scores between 196 and 199 would be admitted, and that 70 percent of the applicants with a TI score of 197 would be admitted.

Professor Wellborn found that 61 of the 68 applicants with

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[40] *Id.*

Hopwood's TI score of 199 were admitted, including four minority applicants. He postulated that, under a race-blind system, there would have been one more offer of admission. He then compared the four admitted minority applicants, Hopwood, and the other denied nonminority applicants, as potential candidates for this one additional spot. Professor Wellborn demonstrated that (1) all four minority applicants were "clearly stronger" candidates for admission than Hopwood, (2) three of the denied nonminority applicants were clearly stronger than Hopwood, and (3) two more denied nonminority applicants were comparable to her. Professor Wellborn concluded that, just as it was in the actual 1992 process, Hopwood's file would have been placed in the discretionary voting zone, and in the end she would not have received an offer of admission.

Professor Wellborn found that 45 of 72 applicants at Plaintiffs Carvell, Elliott, and Rogers's TI score level of 197, including one minority applicant, had been offered admission. He projected that under a race-blind system, six additional offers would have been made at the 197 TI level. Professor Wellborn then compared the files of the one admitted minority candidate, the three Plaintiffs who had 197 TI scores, and the remaining nonminority applicants with that score who had been denied admission. As a result of this exercise, Professor Wellborn concluded that the minority applicant would not have been admitted, and that there would have been a total of seven additional offers at the 197 TI level. He observed that seven of these nonminority applicants stood out as the strongest, all of whom were stronger than Hopwood and the other three Plaintiffs. Additionally, Professor Wellborn identified four more applicants at the 197 TI level who were stronger than Carvell, Rogers, and Elliott, adding that Elliott and Rogers were among the weakest applicants at the 197 level. He offered his opinion that, although Carvell was a stronger applicant than Elliott and Rogers, Carvell still would have been in the bottom half of all applicants with TI scores of 197. Professor Wellborn also explained that

because Carvell took the LSAT twice, his scores should have been averaged by the LSDAS, which would have placed him in a lower TI index group from the start.

ii. *Supplemental Report*

Professor Wellborn was asked to identify (1) all 1992 resident minority (African-American and Mexican-American) admittees who would likely have been denied admission in a race-blind process and (2) all resident nonminority applicants who were denied admission but would have been offered admission in a race-blind process, ahead of the minority applicants identified in the answer to question (1). He did this in his supplemental report.

Professor Wellborn testified that, in completing this analysis, he examined the LSDAS reports of all admitted minority applicants and all denied nonminority applicants with a TI score above 190, and that he then examined the files[41] of those who appeared to be viable candidates based on the LSDAS report. In examining the reports and files, Professor Wellborn applied identical standards to the minority and nonminority candidates and considered the criteria that the Law School had previously identified as standards used for admission. He explained that the most important factors for admission are the LSAT score and undergraduate academic record, which are weighted about equally. He stated further that the personal statement, letters of recommendation, and other materials in the file can be important in some instances. In addition, Professor Wellborn acknowledged that even though the LSDAS treats all GPAs alike for purposes of calculating the TI index score, file reviewers customarily take cognizance of the applicant's class rank and major, the mean LSAT score for the applicant's college,

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[41]Files include the applicant's personal statement, letters of recommendation, and application.

and the applicant's college transcript.[42] He added that comparing the colleges' mean LSAT scores is the best way of evaluating the various colleges and universities in terms of the caliber of their respective student bodies.[43]

When Professor Wellborn completed his examination of these files, he identified 18 minority applicants who, in his opinion, would likely have been admitted without regard to race, and two more minority applicants who, although weaker than the 18, might have been admitted. He labeled the first 18 minority applicants Group A and the two additional minority applicants as Group B.

Professor Wellborn next noted that the Law School made 96 offers of admission to resident minority applicants in 1992. After subtracting the 18 from Group A (those whom Professor Wellborn determined probably would be admitted under a race-blind system), 78 offered places remained available for denied nonminority applicants. In 1992, 398 nonminority Texas residents with TI indexes above 190 (including the four Plaintiffs) were denied admission. Therefore, concluded Professor Wellborn, fewer than twenty percent of these 398 candidates would have received one of the 78 additional offers of admission under a race- blind system. He also examined the LSDAS reports for each of the 3[illegible] resident nonminority applicants with a TI score above 190 who had been denied admission, then examined the files of those applicants among the 398 who, based on his review of the LSDAS report, appeared to be viable candidates. From among those, Professor Wellborn narrowed the remaining nonminority applicants to the 78

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[42]The applicant's class rank, major, and the LSAT mean for the college are all shown on the LSDAS report.

[43]The college LSAT mean is the average LSAT score of students from that college. *See Hopwood B*, 999 F. Supp. at 888 n.34.

whom he found to be the best candidates. He identified these 78 applicants as Group C, then selected the next-best 20 applicants and identified them as Group D. None of the Plaintiffs qualified for inclusion in Group C or Group D. He testified that his comparison of the files of all applicants in the four identified groups further confirmed the weakness of the Plaintiffs' applications.

After completing the selection of the 118 applicants comprising his four groups, Professor Wellborn identified four common characteristics: (1) an LSAT in the 80th percentile or higher; (2) a college class rank in the 60th percentile or higher; (3) graduation from a college with an LSAT mean of 30 or higher; and (4) no more than one year in a community or junior college. He went on to explain his reasons for selecting any applicants who did not meet one of these criteria.

Finally, Professor Wellborn identified the specific weaknesses in each of the Plaintiffs' files that, in his opinion, would have adversely affected their chances of being offered admission. He noted that Plaintiff Elliott was in the bottom half of his class at the University and had no letters of recommendation from faculty. Professor Wellborn also pointed out that only one presumptive admit in Group A had a class rank as low as Elliott's.

Professor Wellborn observed that Plaintiff Rogers's college record was a "worse liability" than Elliott's. He explained that over the course of three separate stints at the University, Elliott had been placed on scholastic probation once and dismissed for academic failure twice. Professor Wellborn remarked that, although Elliott subsequently did achieve a high GPA at UH-D, this school had a "strikingly low" LSAT college mean of 26, adding that an LSAT college mean of 26 was among the lowest he had seen during his many years of service on the Law School admissions committee. He also noted that Rogers's file contained no letters of recommendation.

Professor Wellborn reported that Hopwood's degree school, Cal State at Sacramento, had an LSAT college mean of 28, and that 60 of her credits were from a community college. He acknowledged that Hopwood's LSAT score in the 83rd percentile would be adequate if combined with a reliable college record, but that alone her LSAT was not high enough to overcome the doubts raised by her undergraduate background. Professor Wellborn also mentioned that Hopwood's file contained no letters of recommendation.

In analyzing Plaintiff Carvell's application, Professor Wellborn observed that when this candidate's two LSAT scores are averaged, he has a score in the 76th percentile. Professor Wellborn acknowledged that some of the applicants in his four groupings had low LSAT scores, but explained that in each instance the weak LSAT was counterbalanced by a "very strong" college performance. Professor Wellborn contrasted Carvell's college record, noting that Carvell was in the 59th percentile at a college with an LSAT mean score of 32. He also characterized Carvell's two faculty letters of recommendation as ranging between "unimpressive to downright negative."

c. *Plaintiffs' View of Texas's Evidence*

The Plaintiffs proffered no expert witness of their own, electing instead to attack the work of Professor Wellborn. They ultimately argue that Professor Wellborn's analysis was not "remotely adequate" to carry the Defendants' burden. As we have noted, the district court's eventual determination whether the Law School carried its burden of establishing that the Plaintiffs would have had no reasonable chance of being offered admission under a race-blind admissions system is a question of fact that we review for clear error.[44]

Plaintiffs Carvell and Hopwood argue that Professor Wellborn's

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[44] *Odom*, 3 F.3d at 843.

supplemental report is unreliable because he began its analysis by using these Plaintiffs' applications as a "floor," then seeking to identify applications that were stronger. Hopwood and Carvell also contend that Professor Wellborn cherry-picked aspects of the 1992 system, embracing those that favored his position while ignoring or rejecting aspects that were unfavorable. They point to his assumption that all of the nonminority applicants who were admitted in 1992 would have been admitted under a race-blind system and his rejection of the possibility that Hopwood and Carvell, who received one vote each, would have been selected ahead of candidates who received no votes.

To repeat, the *Hopwood II* panel's remand instructions did not require the Law School to replicate precisely the admissions system that it had employed in 1992; rather, the Law School was simply required to use any reasonable race-blind system. Professor Wellborn clearly stated in his supplemental report that in his evaluation he used the same criteria for minority and nonminority applicants alike. The assumption in his supplemental report that only 96 seats would have been open for admission because all nonminority applicants admitted in 1992 would have been admitted under a race-blind system is logical. Not even the Plaintiffs dispute that it was more difficult for nonminority applicants to gain admission in 1992 than it would have been under a race-blind system; indeed, that is at the core of their argument of reverse discrimination. It is therefore logical to conclude that those nonminority applicants who were admitted in 1992 would have been admitted under a race-blind system.

Hopwood and Carvell nevertheless contend that Professor Wellborn's assumption that the nonminority candidates who were admitted in 1992 would have been admitted under a race-blind system is inconsistent with his refusal to consider the fact that Hopwood and Carvell received one vote each in 1992, placing them

on a waiting list.[45] The flaw in their argument lies in their failure to recognize that in 1992 there were two waiting lists, one for nonminority applicants and one for minority applicants, a situation that, by definition, could not exist in a race-blind system. Coupled with Professor Wellborn's testimony regarding the aberrant nature of the one vote that each of them received--Hopwood's cast for diversity on the basis of age, marital status, and childcare responsibilities, and Carvell's cast by a student member of the Committee--makes problematical the giving of any significance to their positions on the 1992 waiting list in the context of a race-blind system that would have a single, race-blind waiting list and no certainty that, under such a system, a single vote would get an applicant on the waiting list at all.

Professor Wellborn elected to employ a fair alternative. He reconsidered all applicants, both the admitted minority candidates and all of the nonminority candidates, who had TI scores in the same range as the Plaintiffs (above 190). Thus, even though Hopwood and Carvell got no special consideration from Professor Wellborn for their respective votes, neither did the admitted minority applicants--even those who received one or two votes. Under Professor Wellborn's reconstruction, Hopwood and Carvell

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[45]Hopwood and Carvell also argue that failure to consider that each of them received one vote for admission is in direct contradiction to a statement made by Professor Johanson in another discrimination lawsuit, *Malooly v. Texas*, Civ. No. A96CA229SS (W.D. Tex. 1994). The record contains an affidavit by Professor Johanson from that case in which he avers that Mr. Malooly received no votes for admission and that candidates with one, two, or three votes would have been considered superior to Malooly. We do not agree that this statement necessarily makes the method employed by Professor Wellborn inherently unfair or illogical. Furthermore, the statement would have more weight if it were Professor Johanson rather than Professor Wellborn who developed and presented the expert testimony in the instant case.

received treatment equal to all denied minority candidates in their TI range. Professor Wellborn examined the LSDAS report of each one of these applicants and carefully re-examined the entire file of each of those whom he considered to be a viable candidate. All this was done using race-blind criteria.

The Law School supplied additional evidence that cast light on the one vote received by both Hopwood and Carvell. Assistant Dean Laquita Hamilton, who had cast Hopwood's one vote, testified, and provided an affidavit stating, that she had voted for Hopwood in the belief that Hopwood would bring diversity to the incoming class because she was an older student, had worked while in school, and was raising a handicapped child. Dean Hamilton's vote for Hopwood clearly was not cast in the belief that Hopwood was academically more qualified than other applicants based on the system's criteria of LSAT score, college academic record, personal statement, and letters of recommendation.

Carvell's one vote was cast by a student member of the admissions committee. Professor Johanson testified that sometimes the votes of student members of the committee are aberrant departures from the admissions decisions norm, noting that Carvell received no votes from non-student members of the admissions committee.

Finally, the Plaintiffs would make much of Professor Wellborn's acknowledgment that he made a number of small errors in his analysis. These include such things as misstating that each committee member could vote for nine of the 30 applicants in the group of discretionary zone candidates when in fact each could vote for 10. The Plaintiffs also stress that Professor Wellborn failed to consider the difference between applicants with two-digit scores under an older LSDAS system and those with a three-digit TI index in the newer LSDAS system. We have considered each of the flaws singled out by the Plaintiffs and are satisfied that, neither alone nor in combination, are they sufficient to affect the validity of the

studies or to impugn Professor Wellborn's ultimate conclusions.

d. *Plenary Evaluation of Defendants' Evidence*

The nature and history of this case have influenced us to review the record *de novo,* including the Plaintiffs' LSDAS reports and files, all of the LSDAS reports included in Professor Wellborn's report, and the additional application files contained therein. As a result we are further convinced that the district court did not clearly err in finding that the Plaintiffs would not have been offered admission to the Law School under a race-blind admissions system.

The application file of each Plaintiff includes at least one significant weakness. Even though Hopwood's LSAT score was in the 83rd percentile, she had received her undergraduate degree from a relatively weak institution, had garnered at least 60 hours at a community college, and had earned her bachelor's degree from a school with a college LSAT mean of 28. Less than 2 percent of nonminority applicants admitted in 1992 had been graduated from schools with college LSAT means of 28 or below.[46] Furthermore, Hopwood's file contained no letters of recommendation or personal statements. Testifying members of the admissions committee in addition to Professor Wellborn agreed unanimously that Hopwood's undergraduate record and degree institution made her "not well prepared academically" and "very weak in comparison with the overwhelming credentials of so many" of the other applicants.

Plaintiff Carvell took the LSAT twice, and even when averaged, his LSAT score was only in the 76th percentile, well below the median of 89th percentile of those admitted in 1992. Carvell's 3.28 GPA was also well below the 3.53 median for applicants admitted

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[46]The 1992 LSAT means at other colleges demonstrate the relative weakness of this LSAT mean. Harvard University (40); Duke University (39); Rice University (38); Trinity University (36); The University of Texas at Austin (between 34 and 35); Texas A&M University (33).

in 1992, and his file contained one distinctly negative letter: One of his college professors had written that he was"disappointed" in Carvell's grades and that Carvell had a "mediocre" and "uneven" academic performance. Other members of the admissions committee uniformly agreed that Carvell's undergraduate academic performance was "unimpressive."

Plaintiff Rogers also had a relatively weak undergraduate record. Initially he had attended the University, where he was not only placed on academic probation but was twice dismissed for failing grades in a period of three and one-half years. Even though Rogers did eventually graduate with a GPA of 3.13, his degree institution, UH-D, had a very low mean LSAT score of 26, and no letters of recommendation were provided.

Plaintiff Elliott's LSAT score in the 95th percentile was quite good, but his GPA at the University was only 2.98. In his own personal statement, Elliott acknowledged that in undergraduate school he was "an average student, studying when I needed to, partying more than I should, and not managing my time efficiently." Elliott candidly admitted that his undergraduate academic performance "is not of the caliber expected by the University of Texas School of Law."[47]

The Plaintiffs' arguments criticizing the Law School's evidence were presented fully and forcefully to the district court by able counsel and were considered in depth by that court.[48] Its analysis of the Plaintiffs' criticisms of Professor Wellborn's analysis was painstakingly thorough. The district court independently evaluated

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[47]After Elliott failed to gain admission, his father wrote to the Law School indicating that Elliott's friends and family believed that he was not offered admission because of "the mandatory minority and women quotas."

[48]*See Hopwood B*, 999 F. Supp. at 889-92.

Professor Wellborn's methodology by reviewing hundreds of application files itself.[49] Our equally painstaking review of the entire record convinces us that the district court was both indefatigable and disciplined in carefully considering all the evidence and was equally diligent in its consideration and application of the law and arguments presented by all the attorneys. We conclude that the district court's ultimate finding that the Plaintiffs would have had no reasonable chance of being admitted to the Law School under a race-blind admission system was not merely free of reversible error but was eminently correct.[50]

B. Hopwood II *Revisited*

1. *Law of the Case*

We could not reconsider the merits of *Hopwood II* and reverse or revise it, as Texas urges, without first clearing a very substantial hurdle: The law of the case doctrine. Under the strictures of that maxim, "we will not reexamine issues of law addressed by a prior panel opinion in a subsequent appeal of the same case unless: (i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision on the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice."[51] Texas acknowledges that the first two exceptions to this doctrine, which bars a subsequent panel from reversing or disregarding the holding of a prior panel, do not apply to the instant case. Texas contends, however, that the

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[49] *Id.* at 893.

[50] As we affirm the district court's finding that the Plaintiffs would not have been offered admission to the Law School in 1992 under a constitutionally valid system, we need not address the district court's alternative findings on damages.

[51] *Alberti v. Klevenhagen*, 46 F.3d 1347, 1351 n.1 (5th Cir.1995) (internal quotation marks and citation omitted).

third exceptional justification for departing from law of the case does apply here; that the *Hopwood II* panel decision is "clearly erroneous" and will "work a manifest injustice" if it is not overturned.

In the context of the law of the case doctrine," clearly erroneous" is a very exacting standard. "Mere doubts or disagreement about the wisdom of a prior decision of this or a lower court will not suffice for this exception. To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must be dead wrong."[52] Texas asserts that *Hopwood II* is in fact "dead wrong," arguing that its rulings directly conflict with several Supreme Court precedents.

The *Hopwood II* panel held that:

> the University of Texas School of Law may not use race as a factor in deciding which applicants to admit [1] in order to achieve a diverse student body, [2] to combat the perceived effects of a hostile environment at the law school, [3] to alleviate the law school's poor reputation in the minority community, or [4] to eliminate any present effects of past discrimination by actors other than the law school.[53]

Texas attacks *Hopwood II*'s rejection of two of the enumerated justifications as being clearly erroneous. Texas first contends that the University has a compelling interest in remedying the present effects of past discrimination, both by the University itself and by the Texas public education system as a whole. Texas then argues that the University has a compelling interest in obtaining a diverse student body. We shall analyze these two contentions in turn.

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[52] *City Public Service Bd. v. General Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991) (internal quotation marks and citation omitted).

[53] 78 F.3d at 962.

a. *Remedying the Effects of Past Discrimination*

The Supreme Court has conclusively established that the government can, consistent with the Constitution, use racial preferences under particular circumstances to remedy the present effects of past discrimination.[54] But it has also placed several limitations on the use of racial preferences for remedial purposes. In *Wygant,* the Court ruled that the government cannot use racial preferences to remedy general, societal discrimination.[55] In *Croson,* the Court ruled that a municipality cannot use racial preferences in the awarding of construction contracts to remedy discrimination in the construction industry as a whole.[56]

Despite having addressed the subject of remedial racial preferences in several opinions, though, the Supreme Court has yet to establish specific rules for determining precisely how "localized" past discrimination must be before a particular governmental entity (in this case, the Law School or even the University) can, consistent with the Constitution, use racial preferences to remedy the effects of prior discrimination. The *Hopwood II* panel nevertheless stepped into this "rules vacuum" and developed fairly specific guidelines for determining when remedial racial preferences are justified. The panel ruled that (1) the University cannot use racial preferences to remedy discrimination in *other* components of Texas's public education system,[57] and (2) the record evidence did not support the University's use of racial preferences to remedy the effects of its

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[54]*See, e.g., United States v. Paradise,* 480 U.S. 149, 167 (1987) ("[t]he Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor"); *Regents of the University of California v. Bakke,* 438 U.S. 265, 363 (1978).

[55]*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

[56]*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[57]*Hopwood II,* 78 F.3d at 950.

own past discrimination.[58]

In arguing that the rulings of *Hopwood II* are clearly erroneous within the meaning of the law of the case doctrine, Texas contends, as it did then, that the University should be allowed to take race into account as a means of remedying the effects of past discrimination in other components of Texas's public education system. Texas advances two arguments in support of this contention. First, it insists that *Hopwood II* conflicts with the Supreme Court's rejection in *Croson* of the "stark" notion that a governmental entity "must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination."[59] Texas takes this statement out of context, however: The *Croson* court went on to explain that "if [a governmental entity] could show that it had essentially become a 'passive participant' in a [private] system of racial exclusion practiced by [local] elements . . . we think it clear that the [governmental entity] could take affirmative steps to dismantle such a system."[60] This holding is wholly inapplicable here because Texas has never claimed that the University was ever a passive participant in a *private* system of racial exclusion.[61] Thus, *Hopwood II* does not conflict with the Supreme Court's decision in *Croson.*

Second, Texas argues that neither *Wygant* nor *Croson* commands the broad approach taken by the *Hopwood II* panel. This is certainly true: *Hopwood II* went beyond established

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[58]*Id.* at 952-55.

[59]*Croson,* 488 U.S. at 486.

[60]*Id.* at 492.

[61]Neither does the University contend that it was a "passive participant" in a *public* system of racial exclusion; its sole *mea culpa* is to having been an *active* participant in a *public* system of racial exclusion.

Supreme Court precedent in several important respects. Within the law of the case framework, however, it is not clear error for a court of appeals to tackle legal questions that the Supreme Court has declined to answer: Lower courts are bound only by Supreme Court *holdings* and not by the Court's election, either express or implied, to leave open particular legal questions. This or other subsequent panels of our court may well disagree with the aggressive legal reasoning employed by the *Hopwood II* panel,[62] but it cannot be said that, as a matter of law, the panel's decision is "dead wrong." As *Hopwood II* 's ruling with respect to the appropriate scope of remedial racial preferences is not clearly erroneous within the intendment of the law of the case doctrine, we cannot today reconsider that decision with an eye toward disregarding or reversing it.

b. *Diversity as a Compelling Governmental Interest*

Texas also contends that "[i]n holding that diversity may never be a compelling interest justifying the consideration of race or ethnicity in admissions, the *Hopwood II* panel attempted to create a new rule of constitutional law despite the Supreme Court's continued hesitation to do so." Although we agree with Texas's characterization of the *Hopwood II* panel opinion, we have just demonstrated that a federal appeals court's creation of a new rule of constitutional law when a lacuna exists in the Supreme Court's rulings on the point does not constitute clear error.

The diversity rationale was first advanced by Justice Powell in his swing opinion in *Bakke*, in which he wrote only for himself.[63] Although four Justices joined Justice Powell in holding that "the State has a substantial interest that legitimately may be served by

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[62] *See, e.g., Hopwood II*, 78 F.3d at 962 (Wiener, J., specially concurring).

[63] *Bakke*, 438 U.S. at 316-19 (Opinion of Powell, J.).

a properly devised admissions program involving the competitive consideration of race and ethnic origin,"[64] the same four disagreed with him as to the rationale that is necessary to justify constitutionally the government's use of racial preferences. Justice Brennan wrote separately on behalf of the four concurring Justices to express the view that the Constitution permits the government to use racial preferences only "to remedy disadvantages cast on minorities by past racial prejudice."[65] None of the four other justices would go the extra step proposed by Justice Powell and approve student body diversity as a justification for a race-based admission criterion.

Although *Bakke* clearly stands for the proposition that the government can use racial preferences under some circumstances, no controlling rationale emerged from that opinion to delineate precisely what those justifying circumstances are. Thus, in deciding whether the system of racial preferences employed by the Law School was constitutional, the *Hopwood II* panel was free to determine which among the competing rationales offered by the justices in *Bakke* is constitutionally valid.[66] Once the *Hopwood II*

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[64] *Id.* at 320.

[65] *Id.* at 325.

[66] We respectfully disagree, then, with the Ninth Circuit's recent holding that Justice Powell's diversity rationale is binding Supreme Court precedent. *See Smith v. University of Washington,* Nos. 99-35209, 99-35347, 99-35348, 2000 WL 1770045, at *10, (9th Cir. Dec. 4, 2000). Despite the facts that (1) no Justice other than Justice Powell even discussed diversity in *Bakke* and (2) no other Justice joined that part of Justice Powell's opinion that advanced the diversity rationale, the Ninth Circuit nevertheless hypothesized that Justice Brennan (joined by Justices White, Marshall, and Blackmun) "*would have* embraced [the diversity rationale] *if* need be." *See id.* (emphasis added). It follows, at least according to the reasoning of the Ninth Circuit, that Justice Powell's

panel determined to decide the case on the question of compelling state interest and not, as urged in the special concurrence, on the question of narrow tailoring,[67] the panel was constrained in its judgment only by other Supreme Court decisions and by the text of the Constitution itself.

The *Hopwood II* panel ruled that the Constitution does permit the government to use racial preferences for the purpose of remedying the present effects of past discrimination,[68] but that the government cannot constitutionally use racial preferences for the purpose of fostering student body diversity. Although Justice Powell would surely have disagreed with that holding, we cannot say that *Hopwood II* conflicts with any portion of *Bakke* that is binding on this court.[69] Some may think it was imprudent for the

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diversity rationale is "the narrowest footing upon which a race-conscious decision making process could stand" and accordingly is the "holding" of *Bakke* under *Marks v. United States* 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case ... the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."). *See id.* at *10. With respect, however, we do not read *Marks* as an invitation from the Supreme Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices "would have" held. Rather, in the absence of subsequent Supreme Court precedent squarely and unequivocally holding that diversity can never be a compelling state interest, we read *Bakke* as not foreclosing (but certainly not requiring) the acceptance by lower courts of diversity as a compelling state interest.

[67] *Hopwood II,* 78 F.3d at 966 (Wiener, J., specially concurring).

[68] *Id.* at 948-49 (*citing Croson,* 488 U.S. at 500).

[69] We recognize that in a recent challenge to the University of Michigan's use of race in admissions decisions, the district court held that Supreme Court precedent does not bar courts from considering diversity as a compelling state interest. *See Gratz v. Bollinger,* No. 97-CV-75231,

Hopwood II panel to venture into uncharted waters by declaring the diversity rationale invalid, but the panel's holding clearly does not conflict directly with controlling Supreme Court precedent. Inasmuch as the *Hopwood II* panel's ruling on diversity did not rise to the level of clear error, the law of the case doctrine bars our revisiting or disregarding that decision today.

2. *Hopwood B's Injunction*

a. *Standard of Review*

We review the district court's grant of a permanent injunction for abuse of discretion.[70]

b. *Injunction Against Consideration of Race*

On remand from *Hopwood II,* the district court entered an injunction forbidding the Law School and its administrators "from taking into consideration racial preferences in the selection of those individuals to be admitted as students."[71] Texas asks us to reverse that injunction, arguing that it conflicts with the Supreme Court's holding in *Bakke.*[72] In *Hopwood A,* the district court refused to enter an injunction against the University that would forbid the Law

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2000 WL 1827468, at *9 (E.D. Mich. Dec. 13, 2000). Although decided contrary to *Hopwood II* with respect to the constitutional validity of the diversity rationale, *Gratz* is nevertheless consistent with our position that the *Hopwood II* panel was neither constrained to accept, nor required to reject, diversity as a compelling state interest under binding Supreme Court precedent.

[70] *Regions Bank of Louisiana v. Rivet,* 224 F.3d 483, 488 (5th Cir. 2000) (citing *Peaches Entertainment Corp. v. Entertainment Repertoire Assocs., Inc.,* 62 F.3d 690, 693 (5th Cir. 1995)).

[71] *Hopwood B,* 999 F. Supp. at 923.

[72] 438 U.S. 265 (1978).

School's use of racial preferences in its admissions process. On appeal of that ruling, the *Hopwood II* panel stated:

> It is not necessary, however, for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion. If an injunction should be needed in the future, the district court, in its discretion, can consider its parameters without our assistance. Accordingly, we leave intact that court's refusal to enter an injunction.[73]

Despite (1) the district court's original refusal to enjoin the Law School and (2) the *Hopwood II* panel's admonition that it did not believe that an injunction was necessary, on remand the district court in *Hopwood B* entered an injunction barring the Law School "from taking into consideration racial preferences in the selection of those individuals to be admitted as students." Given the *Hopwood II* panel's instructions on remand, the district court was certainly within its discretion to investigate the necessity of entering an injunction and to enter an appropriate injunction if it concluded that one was needed--and apparently it did so. The particular injunction entered by the district court, however, must be reversed for two reasons.

First, in its otherwise extensive and able management of this case on remand, one thing that the district court did not do was conduct a hearing to determine whether an injunction "was needed in the future."[74] Neither did it purport to comply with Federal Rule of Civil Procedure 52(a), which requires federal trial courts to support their judgments with written findings of fact and conclusions of law. Nowhere to be found in the district court's

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[73] *Hopwood II*, 78 F.3d at 958-59.

[74] *Id.*

lengthy and otherwise thorough opinion are any express findings of fact or conclusions of law addressing or supporting the need for an injunction; and we cannot glean any, even implicitly, from other parts of that opinion. We are left no choice, therefore, but to reverse the court's injunction for failure to comply with Rule 52(a). We deliberately elect to reverse rather than vacate the district court's injunction, however, so that we may remand and thereby give the court an opportunity to explicate its findings and conclusions if it should still perceive a need to issue an injunction.

In reversing and remanding, however, we would be remiss if we did not emphasize a second reason for so doing: On its face, the district court's injunction impermissibly conflicts with the square holding in *Bakke*. The *Hopwood B* injunction forbids the University from using racial preferences for *any* reason, despite *Bakke* 's holding that racial preferences are constitutionally permissible in some circumstances.[75] Consistent with that position, *Hopwood II* does not bar the University from using race for any and all *remedial* purposes; rather *Hopwood II* bars the University from using race to remedy the effects of previous discrimination in other components of Texas's public education system only.[76] By enjoining *any and all* use of racial preferences, the district court went beyond the holding of *Hopwood II* and, in the process, entered a judgment that conflicts with *Bakke*. If, on remand, the district court should determine, after conducting an evidentiary hearing or hearings, that an injunction is necessary, and supports that determination with findings of fact and conclusions of law, any injunction that it enters must not exceed the scope of the ruling in *Hopwood II* or the holding in *Bakke*.

C. *Attorneys' Fees*

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[75] *Bakke*, 438 U.S. at 320, 98 S.Ct. 2733.

[76] *Hopwood II*, 78 F.3d at 952.

Both sides have expressed displeasure with the district court's rulings on attorneys' fees. Presumably their displeasure will continue, for we affirm the court's attorneys' fees rulings in all respects.

Congress has provided an incentive for attorneys to take on difficult civil rights cases by allowing district courts in their discretion to shift, from the plaintiffs to the defendants, the cost of prosecuting such an action.[77] Title 42, Section 1988(b) of the United States Code provides:

> In any action or proceeding to enforce a provision of ... [section 1983] ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.][78]

1. *Standard of Review*

The district courts' discretion in awarding attorneys' fees under § 1988 is appropriately broad. We have repeatedly noted in the past, " '[w]hen a district court awards [attorneys' fee pursuant to 42 U.S.C. § 1988], we review the award only for an abuse of discretion .... "A request for attorney's fees should not result in a second major litigation."... We cannot overemphasize the concept that a district court has broad discretion in determining the amount of a fee award.[79] Appellate courts have only a limited opportunity to

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[77] *See* 42 U.S.C. § 1988(b); *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980) ("Congress enacted this statute in 1976 to encourage private attorneys general to enforce fundamental constitutional rights under section 1983.").

[78] 42 U.S.C. § 1988(b).

[79] *Bell v. Schexnayder*, 36 F.3d 447, 449 (5th Cir. 1994) (quoting *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Bd.*, 919 F.2d 374, 379 (5th Cir. 1990) (quoting *Hensley v.*

appreciate the complexity of trying any given case and the level of professional skill needed to prosecute it. In contrast, the district court here has, among other things, observed firsthand the presentation of testimony and argument at trial, sifted through countless depositions and interrogatories, and assessed the value of numerous dispositive filings.

2. *Texas's Contentions*

Texas raises two objections to the district court's award of attorneys' fees: (1) The Plaintiffs are not prevailing parties within the meaning of 42 U.S.C. § 1988(b); and (2) Even if the Plaintiffs are deemed to be prevailing parties, they would not be entitled to any fees because they were unable to achieve any direct relief. The prevailing parties issue was resolved by the district court before the appeal in *Hopwood II*.[80] On completion of that appeal, we remanded with instructions for the district court to determine the reasonableness of the fees, not for the parties to relitigate the prevailing party issue.[81] In any event, the Plaintiffs are quite clearly prevailing parties as "[t]he plaintiffs accomplished the principal goal of the lawsuit--to dismantle all forms of racial preferences in

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Eckerhart, 461 U.S. 424 (1983))). *See also* 1 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 4.15 (3d ed. 1999) ("The fee award [under § 1988] will not be reversed unless it constitutes an abuse of discretion, there is strong evidence that it is excessive or inadequate, or the amount chosen is clearly erroneous.").

[80] *See Hopwood v. Texas*, No. A 92-CA-563 (W.D. Tex. Nov. 14, 1994) (order denying motion for attorneys' fees) ("There is no dispute the plaintiffs have met the minimum condition for prevailing party status by obtaining an enforceable judgment for one dollar in nominal damages.").

[81] *See Hopwood v. Texas*, No. 95-50062 (5th Cir. May 17, 1996) (order vacating judgment denying attorneys' fees and remanding with instructions that reasonable attorneys' fees should be granted).

public higher education in Texas."[82] The insistence of Texas that the Plaintiffs achieved only limited monetary relief is unavailing. Even nominal damages can support an award of attorneys' fees.[83] Attorneys' fees are particularly appropriate here, given the Law School's change of its admissions process as a direct result of the instant litigation.[84]

Texas contends, in the alternative, that the Plaintiffs are not entitled to any fee award because they achieved no specific injunctive or monetary relief. A prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[85] As we discuss below, the district court properly accounted for the Plaintiffs' lack of success in obtaining monetary and other direct relief by reducing their attorneys' submitted hourly totals. We cannot credit Texas's argument that the Plaintiffs have not achieved a compensable goal. As noted, the Plaintiffs have achieved "the principal goal of their lawsuit"--a benefit that inures to all future applicants to the Law School, at least those who advocate a race-blind system. It is important to add in this respect that Section 1988 "is a tool that ensures the vindication of important rights, even when large sums

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[82] *Hopwood B*, 999 F. Supp. at 916.

[83] *See Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (holding that a plaintiff in a civil rights action who wins an award of nominal damages is a prevailing party under § 1988 and therefore eligible for attorneys' fees).

[84] *See Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981) (noting that fee awards are reasonable when plaintiff's lawsuit is "a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior").

[85] *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks and citations omitted).

of money are not at stake, by making attorney's fees available under a private attorney general theory."[86]

3. *The Plaintiffs' Contentions*

The Plaintiffs assert numerous objections to the district court's awards of attorneys' fees. They first object to the court's refusal to consider fee requests for work done after the Supreme Court's refusal to grant their petition for a writ of *certiorari*. The Plaintiffs filed their final supplemental fee applications before the trial on remand in *Hopwood B*. Even if we were to conclude that the district court abused its discretion by entertaining the post-remand supplemental application before the trial rather than after it, such error would be harmless because the Plaintiffs are not prevailing parties on any issues resolved in the post-remand trial. They were not able to prove entitlement to any monetary relief. It is true that the court granted injunctive relief barring any use of racial preferences by the Law School, but to the extent the Plaintiffs prevailed on that issue, their victory was assured by professional services rendered prior to remand.[87]

The Plaintiffs also object to the district court's 25 percent summary reduction based on the inadequacy of the time entries, duplicative work product, and lack of billing judgment of their counsels' submitted hourly totals. The district court did not abuse its discretion in adjusting the number of hours downward.[88] In its opinion, the court lists and describes eleven different instances of

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[86] *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring).

[87] *See Hopwood II*, 78 F.3d at 962.

[88] *See Walker v. U.S. Dep't of Housing & Urban Dev.*, 99 F.3d 761, 770 (5th Cir. 1996) ("The proper remedy when there is no evidence of billing judgment is to reduce the hours awarded by a percentage intended to substitute for the exercise of billing judgment.").

lack of billing judgment by the Plaintiffs' counsel.[89] The Plaintiffs counter on appeal with an affidavit by one of the lead attorneys, insisting that he indeed did exercise billing judgment. Without more, however, the Plaintiffs cannot demonstrate that the district court abused its discretion.

The Plaintiffs further object to the district court's reduction of the submitted hourly totals to account for their lack of success. The Plaintiffs argue that they achieved the "principal goal of their lawsuit" by striking down racial preferences in higher education admissions in Texas. As Texas points out, however, the Plaintiffs did not receive any specific injunctive or monetary relief for their own asserted injuries, and they did not gain admission to the Law School. A fifteen per cent reduction for this lack of success is not an abuse of discretion.[90]

The Plaintiffs next contend that in its analysis of the fee issue the district court ignored some of the factors listed in *Johnson v. Georgia Highway Express, Inc.*[91] to guide the district courts in their attorney's fee inquiries.[92] Specifically, the Plaintiffs argue that the district court either overlooked or failed to consider adequately the following *Johnson* factors: (1) the novelty and difficulty of the

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[89]*See Hopwood B.* 999 F. Supp. at 915-16 (describing, for example, how "thousands of dollars were spent repeatedly reading and reviewing the same Supreme Court cases on affirmative action" and that "compensation [was] sought for non-legal work such as reading a national best seller on affirmative action, attending a panel discussion regarding the impact of the case, and reviewing co-counsel agreements").

[90]*See Albright v. Good Shepherd Hosp.*, 901 F.2d 438, 440 (5th Cir. 1990) (indicating that "those achieving limited or partial success may recover only that which is reasonable in light of the relief obtained").

[91]488 F.2d 714 (5th Cir. 1974).

[92]*Id.* at 717-19.

questions; (2) the skill required to perform the legal service properly; (3) the experience, reputation, and ability of the attorneys; (4) the amount involved and the results obtained; and (5) the "undesirability" of the case.[93] The district court did not abuse its discretion in according these factors little or no weight. The issues presented by this case may well provide grist for the political and legal mills, but they are "neither novel nor extraordinarily difficult[.]"[94] The underlying arguments about the place of affirmative action in the equal protection paradigm have been percolating since the Supreme Court's decision in *Bakke* if not longer;[95] only the evidence and analysis supporting each side have grown more sophisticated over the past two decades. Stated differently, this is not an issue that demanded a large amount of legal excavation in this instance. Additionally, as earlier noted, the Plaintiffs were indeed successful, but no amount of professional chest-pounding or puffery can obscure the fact that none of the Plaintiffs has been offered admission to the Law School or awarded monetary damages for the Law School's refusal or failure to offer them admission.

The district court's denial of fees for work of Plaintiffs' counsel in successfully opposing the attempted intervention by the Thurgood Marshall Legal Society, the Black Pre-Law Association, the NAACP Legal Defense Fund, and the Mexican-American Legal Defense and Educational Fund, is another bone of contention advanced by the Plaintiffs. In particular, they object to the extension of *Independent Fed'n of Flight Attendants v. Zipes*[96] to the facts of this case. The plaintiff in *Zipes* sought an award of

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[93] *Id.*

[94] *Hopwood B.* 999 F. Supp. at 921.

[95] *Bakke*. 438 U.S. 265 (1978).

[96] 491 U.S. 754 (1989).

attorney's fees from the intervenor. The Supreme Court held that recovery of fees from the intervenor cannot be had unless the intervention is "frivolous, unreasonable, or without foundation."[97] Our fellow circuits have extended this holding, in varying degrees, to the award of fees to prevailing plaintiffs from the pockets of losing defendants when the fees are based on interventions by third-parties.[98] We need not decide today whether a prevailing plaintiff is absolutely barred from shifting to the defendant the costs associated with defending against an intervention, for here the Plaintiffs did not "prevail" on this issue vis-a-vis Texas.[99] Texas remained neutral on the intervention issue. In addition, the potential intervenors made clear both to the trial court and to us in *Hopwood I* that the purpose of their intervention was to raise arguments and defenses that Texas itself had no interest in raising.[100] Both we and the trial court denied intervention, holding that Texas would adequately protect the interests of those affected by affirmative action.[101] It would be inequitable now for us to force Texas to pay for costs associated with a failed intervention which, in our determination, would have brought nothing more to the table than did Texas.[102] The Plaintiffs elected to oppose intervention, and

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[97] *Id.* at 761.

[98] *See, e.g., Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 176-78 (4th Cir. 1994); *Bigby v. City of Chicago*, 927 F.2d 1426, 1428-29 (7th Cir. 1991).

[99] *Cf. Reeves v. Harrell*, 791 F.2d 1481, 1483-84 (11th Cir. 1986).

[100] *See Hopwood v. Texas*, 1994 WL 242362, at *1; *Hopwood I*, 21 F.3d at 605.

[101] *See id.* at 606.

[102] *See id.* ("[The proposed intervenors] have not met their burden of demonstrating that they have a separate interest that the State will not adequately represent. The proposed intervenors have not demonstrated

they were successful--but not against Texas: They succeeded against the putative intervenors in a case instituted by Plaintiffs, not by Texas. Neither logic nor equity supports taxing Texas under these circumstances. The district court did not abuse its discretion in denying attorneys' fees to the Plaintiffs for their legal expenses incurred in opposing intervention.

The Plaintiffs' attorneys' fees objections also include the district court's denial of fees for monitoring the comments of Texas in the media and for responding to those comments. The Plaintiffs argue that they are entitled to a fee award for this work because, for example, they were able to use one of the public comments by the Attorney General of Texas in their successful opposition to the granting of a writ of *certiorari* by the Supreme Court. We are chary about granting requests for media fees.[103] The controversy underlying this case is a politically and socially divisive one. The district court's disallowance of fees for combat on the affirmative action issue in the non-legal media is not an abuse of discretion.

The Plaintiffs object additionally to the district court's reduction of their counsels' hourly rates. For instance, Theodore Olson, a noted appellate litigator in our nation's capital and one of the lawyers for Plaintiffs Hopwood and Carvell, had his hourly rate reduced from $450.00 to $225.00. Although Mr. Olson advises that his rate was adjudged reasonable by the D.C. Circuit in an unrelated case, the attorneys' fees calculus is a fact-intensive one and its character varies from case to case. In this case, the district court

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that the State will not strongly defend its affirmative action program. Nor have the proposed intervenors shown that they have a separate defense of the affirmative action plan that the State has failed to assert."); *see also Hopwood II*, 78 F.3d at 960 n.59.

[103] *See, e.g., Watkins v. Fordice*, 7 F.3d 453, 458 (5th Cir. 1993); *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 380 (5th Cir. 1990).

found that in the relevant legal market, which is not the District of Columbia but Austin, Texas, high quality appellate representation could be obtained for a lower rate than that normally charged by Mr. Olson. Hourly rates are to be computed according to the prevailing market rates in the relevant legal market, not the rates that "lions at the bar may command."[104]

In essence, the Plaintiffs' argument is that the out-of-town rates should have been used because the out-of-towners had special competence and there was a lack of available counsel of that quality locally. The district court observed, however, that local counsel had "provided competent and skilled representation"[105] before the Plaintiffs obtained additional non-local counsel, and ventured the belief that local counsel would have been "capable of the same degree of competence regarding the appeal had it been determined he should have remained the plaintiffs' primary lawyer."[106] Contrary to the Plaintiffs' counsel's appreciation of this case, we do not perceive it to have been extraordinarily difficult. Again, the place of affirmative action in higher education has been the subject of legal discourse for many years. The district court's decision to reduce the hourly rates does not constitute an abuse of discretion.[107]

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[104] *Leroy v. City of Houston*, 906 F.2d 1068, 1079 (5th Cir. 1990) (internal quotation marks and citation omitted).

[105] *Hopwood B.*, 999 F. Supp. at 917.

[106] *Id.*

[107] Steven Smith, counsel to plaintiffs Elliott and Rogers, objects that his submitted rate was not adjusted for delay in payment. This contention is unavailing. The district court specifically indicated that it had reviewed the hourly rates for all the attorneys and adjusted them accordingly. In many cases, when the attorneys submitted current hourly rates in addition to historical rates, the court used the current rates to compensate for delay in payment. In Smith's case, the submitted rate of $125.00 was "higher than Smith's normal billing rate and is the highest

In sum, we find no abuse of discretion by the district court in its rulings on attorneys' fees. We therefore affirm those rulings.

III.

CONCLUSION

The district court was correct, and thus free of clear error, in holding on remand that Texas had borne its burden of proving by a preponderance of the evidence that the Plaintiffs would have had no reasonable chance of being offered admission to the Law School in 1992 under a constitutionally valid, race-blind admissions system. In affirming that ruling we avoid the need to address the district court's alternative findings of fact and conclusions of law regarding compensable damages incurred by the Plaintiffs.

The district court failed to comply with the strictures of Federal Rule of Civil Procedure 52(a), however, when it failed to provide findings of fact and conclusions of law to justify its injunction prohibiting absolutely the use of race as a factor in the admissions process. The district court also exceeded the limits of the remand under which it was operating and at the same time conflicted with the aspect of *Bakke* that authorizes consideration of race in higher education admissions to eradicate vestiges of previous

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rate Smith has ever received in any federal civil rights litigation he has undertaken." *See Hopwood B*, 999 F. Supp. at 918. In light of the district court's finding that Smith had limited trial and appellate experience and a limited role in the case, and that the court found many of the requested rates to be excessive, we conclude that the lower court did not abuse its discretion in not increasing Smith's award for delay in payment. We find that the higher rate that he received from the court-- higher than any other case he has tried--takes into account delay in payment. It is important to keep in mind that "attorneys' fee litigation should not require specific reasoning by the trial court to justify every facet of its decision[.]" *Blanchard v. Bergeron*, 893 F.2d 87, 91 (5th Cir. 1990).

discrimination. We therefore reverse the court's grant of that injunction and remand for further proceedings on the injunction issue consistent with this opinion.

As the district court acted within its discretion in all rulings on attorneys' fees, we affirm those rulings in all respects.

AFFIRMED in part; REVERSED and REMANDED in part.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50506

CHERYL J. HOPWOOD; ET AL
Plaintiffs
CHERYL J. HOPWOOD
Plaintiff - Appellant-Cross-Appellee
v.
STATE OF TEXAS; BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM; LARRY R FAULKNER, President of the University of Texas at Austin in his official capacity; UNIVERSITY OF TEXAS SCHOOL OF LAW; M MICHAEL SHARLOT, Dean of the University of Texas School of Law in his official capacity; STANLEY M JOHANSON, Assistant Dean, in his official capacity; THE UNIVERSITY OF TEXAS AT AUSTIN
Defendants - Appellees-Cross Appellants-Cross-Appellees

DOUGLAS CARVELL; ET AL
Plaintiffs
DOUGLAS CARVELL
Plaintiff - Appellant-Cross-Appellee
and
KENNETH ELLIOTT; DAVID ROGERS
Plaintiffs - Appellees-Cross-Appellants
v.
STATE OF TEXAS; REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; RITA CROCKER CLEMENTS; DONALD L EVANS; PATRICK C OXFORD; A W RITER, JR; A R SANCHEZ; WOODY L HUNT; CHARLES MILLER; RAUL R

ROMERO; TOM LOEFFLER, as members of the board
Defendants - Appellees-Cross-Appellants-
Cross-Appellees

Appeals from the United States District Court for the
Western District of Texas, Austin

ON PETITIONS FOR REHEARING EN BANC

(Opinion 12/21/00, 5 Cir., _____, _____ F.3d _____)

Before WIENER and STEWART, Circuit Judges, and LITTLE, District Judge*

PER CURIAM:

(√) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

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*District Judge of the Western District of Louisiana, sitting by designation.

Judges Politz and Higginbotham did not participate in the consideration of the petition for rehearing en banc.

ENTERED FOR THE COURT:

/s/ JL Wiener, Jr. [January 17, 2001]
United States Circuit Judge

Supreme Court, U.S.
FILED
MAY 18 2001
CLERK

No. 00-1609

In The

Supreme Court of the United States

STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS ELLIOTT AND ROGERS IN OPPOSITION

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ARGUMENT

Respondents-plaintiffs Elliott and Rogers support in part the petition for writ of certiorari. This case was organized, filed and litigated by Steven W. Smith, counsel of record for Elliott and Rogers, principally to obtain a negative answer from the Court to the following important question of federal law: whether it is constitutional for the University of Texas School of Law to use race or national origin as a factor in its admissions process. As stated in the petition, "[t]here is consensus that the issues in this case are of national significance." Pet. 17. In addition, it is indisputable that "[t]he Court's long silence on consideration of race in higher education has left conflict and confusion in the lower courts." Pet. 16. Based on the foregoing, Elliott and Rogers request that the Court grant the petition with regard to the first question presented for review.

Pursuant to Rule 15.2, the following misstatement of fact in the petition that bears on what issues properly would be before the Court if certiorari were granted must be addressed. The defendants assert that "once they obtained *Hopwood II's* 'judicial instruction,' [the plaintiffs] opposed any attempt to implement it with a formal injunction." Pet. 25. In support of that statement, the defendants cite a brief filed on behalf of plaintiffs Hopwood and Carvell. In fact, Elliott and Rogers have always sought, and continue to seek, an injunction prohibiting the law school from using race or national origin as a factor in its admissions process. See, e.g., *Hopwood III* Reply Brief of Plaintiffs Elliott and Rogers, at 1 ("the injunction entered by the district court should be upheld

by [the court of appeals] under the law of the case doctrine").

Elliott and Rogers oppose the petition with regard to both the second question presented and the alternative relief sought by the defendants.

CONCLUSION

The petition should be granted with regard to the first question presented for review, and denied with regard to the second question presented and the alternative relief requested.

Respectfully submitted,

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(4)

No. 00-1609

IN THE

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STATE OF TEXAS, *et al.*,

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CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the University of Texas School of Law's 1992 admissions policy, in which it discriminated on the basis of race, was nevertheless justified in order to remedy the effects of past societal discrimination in the State of Texas or to achieve racial diversity.

2.a. Whether the Fifth Circuit's 1996 holding in this case is now appropriate for review in this Court; and

2.b. Whether the district court's award of attorneys' fees was reasonable in light of the Fifth Circuit's 1996 decision.

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BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

Respondents Cheryl J. Hopwood and Douglas W. Carvell ("respondents") respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

This marks the second time in five years that petitioners have asked this Court to issue an advisory opinion, addressing petitioners' use in 1992 of race-based decisionmaking in law school admissions in order to secure "target" numbers of African American and Mexican American enrollees. This Court denied a substantially similar petition for certiorari in this case in 1996. Nonetheless, petitioners again ask this Court to review the circuit court's 1996 opinion by resurrecting and repackaging the same, stale arguments that this Court considered in denying certiorari in 1996.

In 1996, two Members of this Court offered their views of the fatal flaws in this case that make it inappropriate for this Court's review: "petitioners do not defend [the 1992 admissions policy] in this Court" and the Court "must await a final judgment on *a program genuinely in controversy* before addressing" the issue of racial preferences in higher education admissions. *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., respecting the denial of the petition for certiorari; joined by Souter, J.) (emphasis added). Despite this caution from two Justices, petitioners stubbornly ignore what is plain: there is still no such "program genuinely in controversy" in this case. Nothing that has taken place since this Court's 1996 denial of certiorari has altered the then-existing deficiencies in the petition and in the underlying record, nor rendered this case worthy of review by this Court now. *See id.* (quoting from petitioners' 1996 Reply, which "'concede[d]'" that the "'record is inadequate to assess definitively' the constitutionality

of the law school's current consideration of race in its admissions process").[1]

Following this Court's denial of certiorari in 1996, the parties returned to the district court, as required by the Fifth Circuit's 1996 decision. In light of that decision's clear statement of the law, and the Fifth Circuit's faith that petitioners would adhere to the law, respondents did not seek a Rule 65 injunction on remand, and the proceedings during the remand trial were limited solely to issues of causation and money damages arising out of the 1992 admissions process, and the amount of respondents' attorneys' fees. Accordingly, while respondents do not dispute that preventing public universities from applying unconstitutional, racially discriminatory admissions policies is an issue of national importance, this case continues to be an inadequate and improper vehicle for this Court to address that issue.

STATEMENT

A. The Unconstitutionality Of The Law School's 1992 Admissions Policy

All agree that no system of *de jure* discrimination has existed in the State of Texas for more than fifty years and no form of racial discrimination—other than the preferences in admissions for African Americans and Mexican Americans—has existed at the law school since the 1960s. Pet. App. 116a; 6a.

It is equally undisputed that the law school's 1992 admissions policy—the subject of this litigation—unconstitutionally discriminated against respondents on the basis of race. *See* Pet. App. 67a (district court holding policy unconstitutional); Pet. 6 (petitioners acknowledging that they declined to appeal that ruling); Pet. App. 136a (court of appeals confirming that admissions

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[1] Copies of petitioners' 1996 petition and reply brief have been lodged with the Court.

program was unconstitutional).[2] That policy gave favored treatment to two and only two racially preferred groups, African Americans and Mexican Americans.[3] The preferential treatment was not limited to those applicants who were residents of Texas; nor was it limited to those students who had attended public school in Texas. *Id.* at 19a n.22; 112a.

Applicants from the two preferred groups were specially reviewed by a separate "minority" subcommittee charged with the goal of "'recommend[ing] sufficient candidates for admission to achieve a class that was 5% Black and 10% [Mexican American].'" *Id.* at 17a. The results of this system were "virtually indistinguishable from quotas." *Id.* at 146a-147a (Wiener, J., concurring). Admissions standards for these two preferred minority groups were substantially lower and often played a determinative role in admissions decisions.

Indeed, under the Texas Index system used to sort applicants, the district court found that "the presumptive *denial* score for nonminorities was *higher* than the presumptive *admission* score for minorities." *Id.* at 21a (emphases added). The law school also segregated applications in other ways, including color-coding them according to the applicant's race. *Id.* at 81a. Those applicants that fell into a discretionary admit category

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[2] Contrary to petitioners' suggestion that the law school was directed by the Department of Education's Office for Civil Rights to establish the unconstitutional admissions policy, Pet. 4, the district court specifically found in 1994 that the law school "voluntarily" adopted its race-driven system, Pet. App. 36a n.53, and the court of appeals reiterated this finding in 1996, *id.* at 119a.

[3] The law school's unconstitutional admissions policy thus did not purport to apply to all "minorities," and other racially identifiable minority groups, such as Native Americans or Cuban Americans, did not benefit from any special consideration.

were evaluated under separate procedures, and by separate admissions committees, based on their race. *Id.* at 21a-22a.

B. Proceedings Below

Hopwood A[4]

Respondents were residents of the State of Texas who did not belong to either of the two preferred racial groups and who were denied admission to the law school in 1992.

The district court concluded in 1994 that the law school unlawfully discriminated against respondents on the basis of their race. Despite the district court's view that petitioners could justify their use of racial preferences in admissions in order to remedy past discrimination in Texas's educational system and to achieve diversity, it held that the 1992 policy "was not narrowly tailored" to meeting those objectives because of the "separate evaluative processes" employed for preferred and nonpreferred racial groups. *Id.* at 58a-60a, 67a.

Although the district court declared that petitioners violated respondents' constitutional rights to equal treatment, it declined to order respondents' admission to the law school or to issue prospective injunctive relief because the law school had changed its admissions policy since the time the suit had been brought and—significantly—there was no "evidence of the practical application of the new procedure . . . before" the court. *Id.* at 67a-68a. Instead, the court ordered that respondents could reapply to the law school without further charge. The court also awarded respondents nominal damages of one dollar each, in recognition of "the gravity of the noneconomic injury to persons denied equal

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[4] Respondents will use the same terms used by petitioners to refer to the opinions in the lower courts. Pet. 2.

treatment" and "the importance to organized society that those rights be scrupulously observed." *Id.* at 69a.[5]

Hopwood II

Petitioners did not appeal the 1994 *Hopwood A* holding that they had violated respondents' constitutional rights.

Respondents, however, appealed the district court's failure to award further individual relief and its holding that racial preferences could be used to achieve "diversity" or to address past societal discrimination. The court of appeals, following this Court's precedents, reversed the district court in these respects and provided a clear statement of the relevant legal principles governing the use of racial preferences in law school admissions. Specifically, the court of appeals held that the Constitution precluded the use of race as a factor in admissions for the purpose of

> (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.

Id. at 129a. The court also concluded in 1996 that, in light of its clear holding and its belief that petitioners would adhere to the law, it was not necessary "to order at this time that the law school be enjoined." *Id.*

In addition, the court of appeals held that the district court had improperly assigned the burden of proof to re-

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[5] Petitioners now seek to minimize the district court's ruling as merely "invalidat[ing] certain details of the law school's 1992 admissions program," Pet. 6, but it cannot be disputed that the district court held that petitioners' program violated the Fourteenth Amendment to the Constitution of the United States. Pet. App. 59a-60a.

spondents on the issue of whether they would have been admitted to the law school under a constitutional admissions policy. Consequently, the court of appeals remanded the case to the district court for a determination of whether respondents were entitled to additional individual relief (i.e., money damages and/or an order of immediate admission to the law school) under a proper application of the burden of proof. *Id.* at 125a-126a.

Finally, in a separate order, the court of appeals vacated the district court's denial of respondents' requested attorneys' fees and instructed the district court to award respondents their reasonable attorneys' fees on remand. *Id.* at 309a n.81.

This Court's 1996 Denial of Certiorari

Petitioners sought review of the *Hopwood II* decision in this Court, and that petition was denied on July 1, 1996. Justice Ginsburg, joined by Justice Souter, provided an opinion concerning the denial, in which she explained that given petitioners' disavowal of the 1992 admissions policy's constitutionality and the fact that no other policy was "genuinely in controversy," this Court's review was unwarranted. *Texas v. Hopwood*, 518 U.S. at 1034.

Hopwood B

On remand, the district court heard evidence concerning whether respondents would have been admitted under a constitutional admissions system and the amount of respondents' money damages caused by the discriminatory admissions system and the passage of time. No evidence was presented whether, following the circuit court's clear statement of the law concerning the use of race in admissions, an injunction should be entered against the law school.

The district court determined that respondents would not have gained admission to the law school in 1992 even if the law school had employed a policy that

did not unlawfully discriminate on the basis of race. The district court also considered, as instructed by the court of appeals, the proper amount of attorneys' fees to award respondents. Pet. App. 309a n.81. Although it substantially reduced the requested attorneys' fees, the district court found that respondents "attained extraordinary success" and "accomplished the principal goal of the lawsuit," and it awarded $775,760.31 in fees and costs. *Id.* at 252a. The court reaffirmed its award of one dollar each in nominal damages, but awarded respondents no additional money damages.

Finally, the district court *sua sponte* entered a broadly worded injunction against the law school, Pet. App. 270a, despite the Fifth Circuit's conclusion that an injunction was not necessary and the fact that respondents did not renew their request for an injunction against the law school on remand. The district court made no factual findings to support its injunction, as required by Federal Rule of Civil Procedure 52(a).

Hopwood III

Both sides appealed the district court's rulings. Although petitioners sought en banc review in the first instance, the court of appeals rejected their petition and the case was heard by a three-judge panel. In an opinion issued by Judges Wiener and Stewart, and joined by Judge Little sitting by designation, the court of appeals affirmed the district court's finding that respondents would not have been admitted to the law school under a race-blind admissions policy and affirmed the district court's award of attorneys' fees, concluding that the fee award was legally justified under this Court's precedents and the amount awarded was not an abuse of discretion. Pet. App. 298a, 310a-311a, 317a. The court applied the law-of-the-case doctrine and rejected petitioners' argument that the constitutional issues decided in *Hopwood II* were wrongly decided. The court also reiterated that the *Hopwood II* decision was consistent with *Regents of*

the Univ. of California v. Bakke, 438 U.S. 265 (1978), and that nothing in *Hopwood II* conflicted with any controlling precedent from this Court. Pet. App. 301a, 305a.

Finally, the court of appeals reversed the district court's *sua sponte* injunction because it lacked any supporting factual findings or conclusions of law *and* because the district court's injunction was in square conflict with this Court's holding in *Bakke*. Pet. App. 306a-307a.[6]

Both sides petitioned for rehearing en banc. Both petitions were denied on January 17, 2001.

REASONS FOR DENYING THE WRIT

A. This Case Is Less Appropriate For Review Today Than It Was Five Years Ago

Five years ago, petitioners asked this Court to review six questions allegedly raised by *Hopwood II*. This Court declined to grant certiorari. Today, petitioners return to "challenge the judgment of the court of appeals reaffirming [that] court's [1996] 'judicial instruction.'" Pet. 23. Petitioners present questions that, fundamentally, are simply repackaged versions of the questions presented in their prior petition.[7]

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[6] Respondents did not defend the *sua sponte* injunction on appeal because (i) respondents concurred with the circuit courts' view in *Hopwood II* that an injunction was not necessary given that decision's clear guidance, (ii) the district court's injunction was inconsistent with this Court's holding in *Bakke*, and (iii) the injunction indisputably lacked the factual findings required by Rule 52(a). Simply put, the *sua sponte* injunction was indefensible.

[7] The only even arguably new issue that petitioners present is whether the district court's award of attorneys' fees was proper. As the court of appeals noted in affirming that award, respondents were plainly entitled to attorneys' fees as

Petitioners again rely on their claim that the *Hopwood II* panel erred in its 1996 determination that the law school violated the Constitution in its use of racial classifications in admissions decisions.[8] Petitioners do not contend that there has been an intervening change in the relevant law since 1996. Instead, the centerpiece of petitioners' arguments continues to be their patently incorrect assertion that the *Hopwood II* decision is somehow in direct conflict with *Bakke*. *Compare* Pet. 9-10 *with* 1996 Pet. 12-13. As discussed in more detail below, however, the circuit court's decision was fully consistent with what petitioners acknowledge is the holding in *Bakke*, and that fact has remained unchanged since 1996. Pet. 9; *see infra*.

Petitioners also attempt to justify the need for this Court's review by arguing that *Hopwood II*'s holding conflicts with this Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *United States v. Fordice*, 505 U.S. 717 (1992). Pet. 14-16. Both of these decisions were well established in 1996 when petitioners first sought this Court's review, and petitioners made essentially identical arguments then—indeed, petitioners included a specific "question" directed to the *Fordice* opinion in their prior petition. *See*

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a matter of law, and the district court did not abuse its discretion in determining the amount of fees to award. *See infra*.

[8] Petitioners complain that *they* are frustrated with the duration of this litigation. *See* Pet. 22 ("It has taken this case nine years to get here."). It is *respondents* whose constitutional rights were violated, and whose lives and careers have been disrupted and delayed while petitioners attempt at every turn to re-litigate the issues they lost in 1996. That Texas—having *admitted* it unlawfully discriminated against respondents on the basis of race—still seeks to postpone the individual relief awarded to respondents is striking and offensive. And in any event, of course, it took *four* years for this case "to get here" and this Court denied certiorari at that time.

1996 Pet. 16-17, 20-21. As described more fully below, the 1996 *Hopwood II* decision was (and continues to be) fully in accord with *Croson* and *Fordice*.

Petitioners seek to manufacture a "new" issue by suggesting that in 1996 this Court misunderstood the nature of *Hopwood II*'s so-called "judicial instruction" in which it stated the clear rule of law as to when racial classifications in an admissions system could and could not be constitutionally employed. Pet. 29 (this Court "had every reason to expect that either the judgment below had not attempted to grant prospective relief or that, if it had, the courts below would promptly embody that prospective relief in a properly appealable injunction or declaratory judgment"). Petitioners' effort misses the mark entirely.

The *Hopwood II* court could not have been more clear in its view that a formal injunction was unnecessary. Pet. App. 129a ("It is not necessary . . . for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the [law] school, as well as its attorneys, will heed the directives contained in this opinion."). Thus, in 1996 there was *no reason* (not petitioners' "every reason" (Pet. 29)) for this Court to believe that a Rule 65 injunction would be forthcoming from the courts below. Moreover, however petitioners may characterize the "judicial instruction," they clearly understand it and have been complying with it. Pet. 24 (noting that petitioners "have complied [with *Hopwood II*] for five years and will continue to do so" unless that decision is overturned or superseded).

As petitioners elsewhere recognize, the *Hopwood II* opinion contained "a clear directive from the federal courts," Pet. 22, that was "stated, three times, with all the precision of an injunction or declaratory judgment." *Id.* at 24. Presumably, this Court considered that "clear," "precise," and thrice-stated "directive" in 1996. Petitioners now concede that the circuit court's 1996 de-

cision clearly stated the law and they assert that the "judicial instruction" is reviewable by this Court. *Id.* at 22, 26. Of course, the 1996 "judicial instruction" has not suddenly become reviewable; the *Hopwood II* decision was fully reviewable in 1996.

The driving force behind petitioners' claim that this Court misunderstood the *Hopwood II* decision seems to be petitioners' interpretation of Justice Ginsburg's opinion regarding the denial of certiorari in 1996. Pet. 22; *Texas v. Hopwood*, 518 U.S. 1033 (1996). Apparently, petitioners are of the view that this Court denied certiorari in this case in 1996 because the "judicial instruction" was not in the form of an injunction.[9] Respondents are reluctant to over-interpret the one-paragraph opinion provided by Justices Ginsburg and Souter. Nonetheless, the crux of that opinion is that review was inappropriate because there was no admissions policy in controversy. *See id.* at 1034 (stating that the Court "must await a final judgment on a program genuinely in controversy"); *see also id.* (quoting from petitioners' 1996 Reply to explain that "'[a]ll concede this record is inadequate to assess definitively' the constitutionality of the law school's current consideration of race in its admissions process"). The record on this point is no different now than it was in 1996; there remains no evidence concerning any admissions policy other than the abandoned 1992 system.

Finally, petitioners invoke the development of cases in other circuits that address the question of using racial preferences in higher education admissions. Despite petitioners' protestations to the contrary, those cases appear to be better candidates for this Court's considera-

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[9] As petitioners themselves acknowledge, however, "this Court has recognized that form is not dispositive, and that orders with all the practical consequences of an injunction will support appellate jurisdiction." Pet. 26 (citing *Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981)).

tion of the use of race in admissions decisions—should review be deemed appropriate at all—and those cases' emergence in the years since this Court denied petitioners' prior petition offers no reason for granting their flawed petition now. Most fundamentally, these other cases—unlike this case—have live controversies over specific admissions policies. In *Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3593 (U.S. Feb. 21, 2001) (No. 00-1341), for example, there remains an ongoing controversy over the admissions policy at issue and the law school continues to defend that policy. The announcement of decisions in *Smith* and other cases in the last several months may have brought the issue of racial preferences in admissions to the fore, but that in no way supports granting review of *this* case.[10]

In sum, nothing that has transpired in the last five years makes this case any more worthy of this Court's review now than it was in 1996. To the contrary, laws enacted by the Texas Legislature since 1996 addressing admissions procedures have made this case *even less* appropriate for review.[11]

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[10] On pages 18 through 20 of their brief, petitioners make a host of unsubstantiated assertions about matters that are wholly outside of the record in this case, including the contention that because minority students who "approach or approximate but do not exceed the ever-rising threshold for admission" to the law school are not being admitted, "the pursuit of academic excellence" has been "abandon[ed]." Pet. 18, 20. None of these baseless assertions has ever been reviewed by a court.

[11] According to petitioners, the legislature "responded to *Hopwood II*" by guaranteeing admission to any Texas public university to those Texas high school students who graduate in the top 10% of their class and by directing Texas universities to consider many admission factors, which petitioners believe act as "proxies" for racial diversity. Pet. 19.

B. The Decision Below Does Not Conflict With Any Of This Court's Decisions

1. The Court Of Appeals Was Faithful To The Holding In *Bakke*

Petitioners grossly misconstrue this Court's holding in *Bakke*, the Fifth Circuit's interpretations of *Bakke*, and its holdings in this case.

As they did in 1996, petitioners begin by properly quoting, in its entirety, the only paragraph from *Bakke*'s equal protection analysis that garnered five votes:

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Pet. 9 (citing *Bakke*, 438 U.S. at 320 (Part V-C of the opinion of Powell, J.) and *id.* at 328 (opinion of Brennan, J., concurring in Part V-C along with three others)); 1996 Pet. 12-13. Petitioners acknowledge that these two sentences are "the holding in *Bakke*." Pet. 9.

Shortly after recognizing the "holding" of *Bakke*, however, petitioners engage in a classic sleight of hand and condemn the court of appeals for failing to follow the various "rationales" presented in *Bakke*, Pet. 9, and for "reject[ing] *Bakke*'s authority as law." *Id.* at 10. Arguing that *Bakke* dictates that diversity in higher education is a compelling government interest, petitioners attack the *Hopwood II* opinion as inconsistent with this notion. Throughout their discussion of *Bakke*'s diversity rationale, however, petitioners are unable to cite to *Bakke* to support their argument, opting instead to cite

lower court cases discussing Justice Powell's lone opinion on the diversity rationale. *Id.* at 10-13.

Of course, both the *Hopwood II* and the *Hopwood III* panels fully conformed to "the holding" in *Bakke*. *Id.* at 9. Contrary to petitioners' repeated distortions, the court of appeals has not held that race could never be considered in admissions. *Id.* Instead, the *Hopwood II* court considered the four justifications that the law school proffered for its use of racial classifications in admissions and concluded that none of them was constitutionally adequate to justify the racially discriminatory practices being employed. Pet. App. 136a. As the circuit court's discussion indicates, however, it did not foreclose the use of race in all conceivable situations, and in fact noted that if the law school itself had engaged in past discrimination, the effects of which were presently being felt, the law school could be justified in remedying its own prior conduct. *Id.* at 114a.[12]

Were there any doubt about the Fifth Circuit's faithfulness to *Bakke*, the *Hopwood III* court's explicit denunciation of the district court's overly broad *sua sponte* injunction should lay that doubt to rest. Although petitioners state that reversal of the injunction was "primarily on procedural grounds," Pet. 8, the Fifth Circuit was quite clear that: "On its face, the district court's injunction impermissibly conflicts with the square holding in *Bakke*." Pet. App. 307a.

Petitioners spin their incorrect assertion that the court of appeals rejected *Bakke* as authoritative law, into the quite separate argument that other courts have em-

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[12] Petitioners contradict themselves on this point by asserting that the court of appeals imposed a "blanket prohibition of any consideration of race in admissions," Pet. 9, but recognizing two pages later that "the Fifth Circuit[] [held] that consideration of race is limited to remedial interests." *Id.* at 11.

braced Justice Powell's diversity rationale. *Id.* at 11-13. But as even petitioners acknowledge, most courts that have considered the diversity rationale have simply adopted the approach that Judge Wiener took in his *Hopwood II* concurrence, and assumed *arguendo* that diversity could be a compelling interest before striking down a racial preference system on other grounds. *See, e.g., Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 130 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998). These courts thus did not endorse the reasoning that petitioners press in their brief, i.e., that *Bakke* requires the conclusion that diversity is a compelling interest.

The *only* cases that petitioners cite to support their position that diversity is a compelling interest are *Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3593 (U.S. Feb. 21, 2001) (No. 00-1341), and *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000). And only the *Smith* court concluded—erroneously—that *Bakke* somehow mandated that conclusion. *Compare Smith*, 233 F.3d at 1200 (stitching together its conclusion with the hypothesis that Justice Brennan (and Justices White, Marshall, and Blackmun) "would have embraced [the diversity rationale] if need be") *with Gratz*, 122 F. Supp. 2d at 819, 822 ("It is clear that no five Justices in *Bakke* expressly held that diversity was a compelling interest under the Equal Protection Clause"; but nonetheless concluding that Supreme Court precedent does not "bar[]" finding that diversity could be compelling).

Without resorting to the type of guesswork that the Ninth Circuit undertook in *Smith*, the conclusion that the Fifth Circuit's decision is somehow in "conflict with *Bakke*," as petitioners state, is erroneous. Pet. 9. As petitioners' quotation of "the holding" of *Bakke* makes clear, Justice Powell's diversity rationale is not included

in Part V-C of the *Bakke* decision, and thus is not binding precedent.

Moreover, even Justice Powell's view of diversity was far more complex than the simplistic, race-based approach that the law school embraced in its 1992 admissions policy. Justice Powell's opinion did not state that adding a target number of students from minority ethnic groups would satisfy the state's high burden in justifying the use of racially discriminatory admissions practices. Rather, he stated that an "admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 307. Yet the law school's use of racial preferences had the sole result of increasing "facial diversity" not "true diversity," Pet. App. 147a (Wiener, J., concurring), and thus did not conform even to Justice Powell's concept of diversity.

Finally, no other decision from this Court has found diversity to be a compelling state interest under strict scrutiny analysis.[13] Indeed, as four Members of this Court have expressly stated: "Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting), *overruled by, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227

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[13] In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), this Court applied intermediate scrutiny in determining that diversity in the ownership of broadcasting facilities is an "important governmental objective." *Id.* at 567-68. *Metro Broadcasting*'s use of intermediate scrutiny was expressly overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

(1995); *see also Croson*, 488 U.S. at 507 (rejecting "outright racial balancing" as a compelling interest).[14]

The Fifth Circuit's decision not to embrace Justice Powell's singular views regarding the strength of a "diversity" interest in higher education was entirely in keeping with *Bakke*'s holding and with subsequent decisions of this Court.

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[14] Petitioners occasionally argue that this Court's precedent regarding racial preferences from outside the context of education has no relevance for this case, and that *Bakke* is the only pertinent decision. *E.g.*, Pet. 12 (attacking court of appeals for having relied on cases that "say next to nothing about education"); *id.* at 13 (court of appeals "inappropriately and bluntly applied th[is] Court's conclusions" from public contract cases). That position is inconsistent with petitioners' own claim at the outset of their petition that review of this case is justified because of the importance of these issues "to the larger arena of the States' use of racial classifications" outside public education. *Id.* at 2. Moreover, this Court has emphasized the consistency and continuity of the Court's equal protection analysis in this area. In *Adarand*—a decision not cited by petitioners—this Court traced the treatment of the issue from the 1940s "through *Croson*" and emphasized that the same legal standard applies whatever the particular government policy at issue. *See Adarand*, 515 U.S. at 214-27. This Court's analysis has never sought to isolate the principles announced in a case involving higher education from the principles announced in a case involving public contracts, or any other context. *See, e.g.*, *id.* at 214, 218-21 (analyzing *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Bakke*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), each of which involved a very different form of race-based governmental action).

2. The Court Of Appeals Properly Applied This Court's Precedents To Conclude That The Law School's Admissions Policy Was Not A Constitutional Means Of Remedying Past Discrimination

As in 1996, petitioners again appear to attack the circuit court's conclusion that the 1992 admissions policy was not justified on the grounds that it was remedying effects of past discrimination. Pet. 14-16; 1996 Pet. 16-20. The Fifth Circuit's conclusion was correct and entirely consistent with this Court's precedents.

Petitioners argue that the law school's admissions policy was justified by the State of Texas's discrimination in the students' "earlier years" in primary and secondary education. Pet. 14. This Court has rejected this very argument. *See Croson*, 488 U.S. at 499 (rejecting notion that "discrimination in primary and secondary schooling justifies" race preferences in professional school admissions). Any preferential treatment on the basis of race must be designed to remedy prior discrimination "by the governmental unit involved," i.e., the law school. *Wygant*, 476 U.S. at 274 (plurality opinion).[15] And, in any event, Texas did not narrowly tailor its racial preferences to students who were products of the Texas public school system.

Petitioners have also sought to justify the admissions program on the grounds that it will remedy "effects" of past discrimination such as the law school's "lingering reputation in the minority community . . . as a 'white' school" and "some perception that the law

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[15] For this reason, the court of appeals concluded that because petitioners' argument regarding the "underrepresentation" of minorities in the law school was tied to past discrimination by Texas's educational system as a whole—and not by the law school—it did not justify the law school's racially discriminatory practices. Pet. App. 117a-119a.

school is a hostile environment for minorities." Pet. App. 45a. As the court of appeals made clear, these effects are not attributable to the law school's past conduct, but rather result from "knowledge of historical fact" and present *societal* discrimination. *Id.* at 115a-117a. As this Court has explained, remedying the effects of "societal discrimination" is not a valid justification for racial classifications:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

Wygant, 476 U.S. at 274 (plurality opinion); *see id.* at 288 (O'Connor, J., concurring) ("I agree with the plurality that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."); *see also Croson*, 488 U.S. at 498-99, 505.[16]

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[16] Petitioners' assertion that the *Hopwood III* decision conflicts with the "passive participant" reference by three Members of this Court in *Croson* is mistaken. Pet. 15-16. First, *Hopwood III* merely notes that the State never claimed that the University was ever a "passive participant" in either a private or public system of racial discrimination. Pet. App. 301a & n.61. Second, petitioners' interpretation stretches the passive participant reference so far as to conflict with *Croson* itself, which rejected the use of racial classifications to remedy societal discrimination. *See Croson*, 488 U.S. at 498-99, 505. The "passive participant" theory thus cannot be used to justify—as petitioners seem to suggest—government's attempts to remedy acts of private discrimination under the guise that it was a "passive participant" in allowing that private discrimination to take place. Indeed, such an approach

As in 1996, petitioners also invoke *United States v. Fordice*, 505 U.S. 717 (1992), to contend that the 1992 admissions policy was justified. Pet. 14-15; 1996 Pet. 20-21. According to petitioners, *Fordice* somehow dictates that the law school can remedy prior discrimination that it had no part in, but was solely attributable to the State of Texas. Pet. 14-15.

The premise of petitioners' argument is unfounded. In *Fordice*, this Court held that a State that had operated a dual system of higher education must "reform[] to the extent practicable and consistent with sound educational practices" those policies "*traceable*" to the *de jure* era of segregation. *Fordice*, 505 U.S. at 729 (emphasis added). Petitioners have failed to identify any law school admissions practice that is traceable to the *de jure* era in Texas education. In fact, the record makes clear that beginning in the 1960s petitioners employed admissions policies that granted preferences to minorities. Pet. App. 12a. There was thus a clean break with the *de jure* practices of the 1940s. Moreover, it is undisputed that neither the State of Texas nor the law school ever engaged in any discrimination against Mexican Americans in education.

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would transcend the limitation established by this Court's rejection of the "societal discrimination" rationale, and would have "no logical stopping point." *Croson*, 488 U.S. at 498; *see also Adarand*, 515 U.S. at 220-24 (citing with approval both *Wygant*'s clear rejection of the "societal discrimination" justification and the holding in *Croson*).

Id. at 122a n.50.[17] *Fordice*, thus, offers no support for petitioners.[18]

3. Contrary To Petitioners' Claim, This Case Is Not Uniquely Appropriate For Review

Petitioners attempt to distinguish this case from other cases in which the issue of racial preferences in admissions is more squarely in controversy, by arguing that this is the only case that involves both a diversity rationale and a remedial rationale for racial preferences.

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[17] The *Hopwood II* court concluded that "there is no dispute that the law school has never had an admissions policy that excluded Mexican Americans on the basis of race," and that "[w]hile the school once did practice *de jure* discrimination in denying admission to blacks" that practice ceased with this Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950). Pet. App. 116a.

[18] Petitioners also cite a Second Circuit case, *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000), and claim that *Brewer* recognized a non-remedial justification for racial classifications as a compelling interest and thus conflicts with *Hopwood II*. Pet. 15. *Brewer* is not inconsistent with *Hopwood II* for several reasons. First, the *Brewer* court was not confronted with either diversity or remedying effects of past discrimination as purported justifications for racial classifications. The court expressly noted that *Bakke* and its various rationales are "not directly on point." *Brewer*, 212 F.3d at 751. Second, the factor that led the *Brewer* court to conclude that combating *de facto* segregation could be a compelling interest was that it felt constrained by its own prior case law that had never been overruled. *See Brewer*, 212 F.3d at 752. Finally, after reviewing this Court's decisions in *Croson* and *Wygant*, the Second Circuit expressly stated that "Supreme Court precedent, admittedly, provides fairly strong support for the District Court's conclusion that there is no compelling interest in the Program here." *Id.* at 748. All of these distinguishing characteristics limit *Brewer*, at most, to its particular setting.

Pet. 21-22. That assertion is inaccurate and petitioners' reasoning is unconvincing in any event.

As an initial matter, this is not the only case that presents both a "remedy" and a "diversity" rationale. Petitioners recognize, but seek to gloss over, the *Grutter* and *Gratz* cases currently pending in the Sixth Circuit. Pet. 21 n.2. In both of these cases, defendants and intervenors have attempted to justify racially discriminatory admissions policies at the University of Michigan and its law school on the grounds that the policies are intended to achieve diversity *and* to remedy present effects of past discrimination. *See Grutter v. Bollinger*, 2001 U.S. Dist. LEXIS 3256, at *85, *139-*142 (E.D. Mich. Mar. 27, 2001) (rejecting both the University of Michigan Law School's diversity justification and defendant-intervenors' remedial justification); *Gratz v. Bollinger*, 2001 U.S. Dist. LEXIS 4457, at *29 (E.D. Mich. Feb. 26, 2001) (rejecting defendant-intervenors' remedial justification); *Gratz*, 122 F. Supp. 2d at 816 (addressing University's diversity rationale).

In *Grutter*, the court's description of the flaw in intervenors' argument is quite similar to one of the flaws that the *Hopwood II* court discerned in this case: the "lower grades and test scores of underrepresented minorities is attributable, at least in part, to general, societal racial discrimination against these groups," but as a matter of constitutional law "the effects of general, societal discrimination cannot constitutionally be remedied by race-conscious decision-making." *Id.* at *140-*42; *cf.* Pet. App. 115a-118a. The *Gratz* court rejected similar arguments. *See Gratz*, 2001 U.S. Dist. LEXIS 4457, at *29 (concluding that alleged discrimination was at most attributable to "racial hostility on campus" and not to "the University itself"). That a law school cannot use race in admissions purportedly to remedy effects of "societal discrimination" is thus not a concept singularly recognized by the *Hopwood II* court.

In any event, the law school's 1992 admissions policy contained so many constitutional flaws that review in this Court of the questions raised by petitioners would amount only to an advisory opinion. As an initial matter, petitioners—as in 1996—do not defend the 1992 program. Moreover, even if this Court disagreed with the majority's opinion in *Hopwood II*, and found that the law school had asserted a compelling interest that could justify the use of racial classifications, the 1992 policy was plainly not narrowly tailored to achieving any such purported objective, and the *Hopwood II* decision could be affirmed on that separate and independent ground. As Judge Wiener noted in his 1996 concurrence, the remedial and non-remedial justifications that petitioners advanced for the admissions policy were inconsistent with one another. Pet. App. 146a n.24 (Wiener, J., concurring). The law school's asserted interest in remedying the effects of prior discrimination faces the obvious and insurmountable obstacle that there is no evidence of past *de jure* discrimination against Mexican Americans in the State of Texas let alone any discrimination by the law school. Pet. App. 121a-122a n.50. Despite the lack of any past discrimination, the admissions program employed by the law school had as its "goal" twice as many spots for Mexican Americans than for African Americans (who undoubtedly were discriminated against on a *de jure* basis until 50 years ago), thereby belying the assertion that the objective of the policy was to remedy past discrimination. *Id.*[19] The remedial basis is further

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[19] The *Hopwood II* majority similarly noted that, as a result, the policy would not appear narrowly tailored to, or even aimed at, achieving "a goal of remedying past discrimination." Pet. App. 121a-122a n.50. Thus, both the Fifth Circuit and the district court indicated that Texas failed the "narrow tailoring" prong of the strict scrutiny test. *See also Croson*, 488 U.S. at 506 (noting that the "inclusion of racial groups that, as a practical matter, may never have suffered from dis-

belied by the admissions policy's application of the racially preferential treatment to African Americans and Mexican Americans who never lived in the State of Texas or attended the public schools in that State. Meanwhile, by choosing to favor only two minority groups, "and doing so with a virtual quota system for affirmative action in admissions, the law school estops itself from proving that its plan to achieve diversity is ingenuous, much less narrowly tailored." Pet. App. 146a n.24 (Wiener, J., concurring). As noted above, under Justice Powell's *Bakke* opinion, the Texas program was "discrimination for its own sake." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

Finally, whatever distinctions might be conjured up to highlight a particular aspect of the *Hopwood* decisions, the fact remains that—unlike some other cases cited by petitioners—there is no contested policy at issue. This case was plainly inappropriate for this Court's review in 1996 and that remains true today.

C. There Is Nothing Peculiar About The Holdings Of *Hopwood II* Or *Hopwood III* That Requires Further Review

1. *Hopwood II* Was Never Improperly "Insulated" From Further Review

Evidently concerned that their repetition of theories for review advanced in their 1996 petition continues to lack merit, petitioners offer a series of misguided assertions in the final pages of their petition. Pet. 26-29. Petitioners cite *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *City News & Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001), seemingly to contend that this case should be reviewed because the decisions below have previously been "insulated" from review by

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crimination . . . suggests that perhaps the . . . purpose was not in fact to remedy past discrimination").

this Court. Pet. 26-27. *City of Erie* and *City News & Novelty, Inc.*, however, stand for the simple proposition that when a party prevails in having a local ordinance struck down, that party's subsequent voluntary abandonment of its practices to which the ordinance was directed will not serve to moot the case and prevent review of the lower court's opinion. *See City of Erie*, 529 U.S. at 287-88 (fact that operator of nude dancing establishment had closed business would not moot the case); *City News & Novelty, Inc.*, 121 S. Ct. at 747. These mootness cases are inapposite here. Respondents have done nothing to attempt to moot this case, and indeed respondents vigorously contested portions of the district court's opinions in both *Hopwood II* and *Hopwood III*.[20]

Moreover, petitioners' arguments about the reviewability of this case rely on a misstatement of the facts. Petitioners are wrong when they assert that respondents "opposed any attempt to implement" *Hopwood II* with "a formal injunction" in order to render "more difficult any further review of the 'judicial instruction.'" Pet. 25. Rather, on remand after *Hopwood II*, respondents followed that court's guidance that an injunction was unnecessary in light of the clear statement of the law in *Hopwood II* and the belief that the law school would comply with the law. Respondents had no new evidence that the law school would not comply with the *Hopwood II* decision; accordingly, respondents did not renew their request for a Rule 65 injunction on remand. Indeed, both petitioners and respondents proceeded on remand with the understanding that the *only* issues remaining in this case were causation, additional individual relief for

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[20] Petitioners' half-hearted mootness argument predicated on *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) and *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), is equally misplaced because it is premised on the legal fiction that the constitutional issues decided in *Hopwood II* were not reviewable in 1996. Pet. 28-29.

respondents, and the amount of attorneys' fees. Respondents did not defend the district court's facially flawed *sua sponte* injunction in the court of appeals for the reasons discussed in note 6, *supra*. To be clear: respondents have not retreated from their position that the law school is bound by the *Hopwood II* decision.[21]

Nothing has improperly "insulated" this case from review. The issues petitioners present today were considered by this Court in 1996.[22]

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[21] Petitioners are also mistaken in their assertion that under this Court's per curiam opinion in *Texas v. Lesage*, 528 U.S. 18 (1999), respondents are not entitled to prospective relief (presumably meaning the law school's continued adherence to *Hopwood II*) unless they again seek a Rule 65 injunction from the district court. Contrary to petitioners' claim that *Lesage* impacts respondents' standing, Pet. 28, *Lesage* merely identified an affirmative defense to one kind of damages and does not consider standing at all. *See Lesage*, 528 U.S. at 21-22; *Wooden v. Bd. of Regents of the Univ. Sys. of Georgia*, 2001 U.S. App. LEXIS 7159, *41 (11th Cir. Apr. 19, 2001) (*Lesage* "does not refer to standing at all"). Moreover, unlike *Lesage*, respondents here achieved "forward-looking" relief from the court of appeals in 1996 inasmuch as the *Hopwood II* opinion has compelled the law school to adhere to a race-neutral admissions policy. *See* Pet. 22, 24. There is no constructive reason for respondents to pursue additional, and overlapping, injunctive relief that the court of appeals concluded in 1996 was unnecessary, particularly in light of petitioners' repeated statements that they are bound by, and will continue to adhere to, the judgment in *Hopwood II*. *See, e.g.*, Pet. 22, 24.

[22] The gravamen of petitioners' arguments is that they are generally unhappy with the *Hopwood II* decision—they never assert that the 1992 admissions program was constitutional. Of course, unhappiness with a decision does not by itself create an issue that is worthy of this Court's review. Indeed, respondents are quite unhappy with the manner in which the lower courts applied the burden shifting mechanism required by *Mt. Healthy City Sch. Dist. Bd. of Educ. v.*

2. Respondents' Receipt Of Attorneys' Fees Was Entirely Justified And Is Not A Basis To Support This Court's Review

In a confused discussion apparently designed to demonstrate that this Court's review is more appropriate today than it was in 1996, petitioners also insert a back-door challenge to the award of attorneys' fees. Pet. 25-26. Review of the lower court's award of attorneys' fees, in which it slashed respondents' requested fees by half and which the court of appeals affirmed, is wholly unwarranted. Petitioners' request for "summar[y] revers[al]," Pet. 30, in their petition is even more far-fetched. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 340 n.9 (1979) (noting that summary reversal is an "extraordinary action").

The fact remains that respondents are clearly entitled to the award of fees. In *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court explained that in order to qualify for attorneys' fees under 42 U.S.C. § 1988 one must be a prevailing party, that is "a civil rights plaintiff [who] obtain[ed] at least some relief on the merits of his claim." *Farrar*, 506 U.S. at 111. Notably, a plaintiff who recovers even nominal damages is deemed a prevailing party. *Id.* at 112. There can be no dispute that respondents are prevailing parties in this case, as they have continuously prevailed on their claim that petitioners violated their constitutional rights, they were granted the right to reapply at no further cost, they have further been awarded nominal damages for their injuries, and they induced the

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Doyle, 429 U.S. 274 (1977), in concluding that petitioners carried their burden of proving that none of the respondents would have been admitted to the law school under a constitutional admissions system. The court of appeals plainly erred in reaching that conclusion despite, among other things, numerous concessions by petitioners that the burden was "impossible" for them to carry.

law school to change its admissions policy. Pet. App. 68a-69a; *id.* at 309a, 309a nn.80 & 81. Respondents attained all of this relief from the district court in 1994 (or prior to its ruling), and petitioners *did not appeal* that decision. Thus, petitioners were prevailing parties even before the *Hopwood II* decision, which afforded respondents additional relief by ensuring that any future application submitted to the law school (by respondents or others) would be reviewed under a constitutional race-neutral process.

Once prevailing party status is established, the only remaining question is the reasonable amount of attorneys' fees to award. Under § 1988, the district court is entitled considerable leeway in determining "in its discretion" where to set the level of attorneys' fees. *See* 42 U.S.C. § 1988(b); *Farrar*, 506 U.S. at 119 (O'Connor, J., concurring). In this case, the district court recognized, and petitioners have confirmed, that respondents "accomplished the principal goal of the lawsuit" in precipitating a change in the law school's admissions policy. Pet. App. 252a; Pet. 25.[23] Surely, respondents' victorious constitutional challenge to the law school's 1992 admissions policy, including the circuit court's pronouncements that the law school had failed to establish a compelling interest in justifying its policy, and that school's subsequent change in admissions practices constituted "the vindication of important rights" of the type that § 1988 was intended to support. *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring) (Section 1988 "is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making

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[23] Petitioners invoke this Court's decision in *Hewitt v. Helms*, 482 U.S. 755 (1987) to support their argument, but that case is inapposite. Pet. 26, 28. In *Hewitt*, the plaintiff was not a prevailing party, *see Hewitt*, 482 U.S. at 759-60, while in this case respondents indisputably are—as the district court expressly found. Pet. App. 241a.

attorney's fees available under a private attorney general theory"). In any event, the amount of the lower court's award of attorneys' fees cannot be said to be an abuse of discretion, and there is certainly nothing worthy of certiorari review about the award.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNIVERSITY OF TEXAS LAW SCHOOL,
Petitioner,

v.

CHERYL J. HOPWOOD, *et al.*
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* OF TEXAS LAW SCHOOL DEANS IN SUPPORT OF PETITIONER'S REQUEST FOR GRANT OF WRIT OF CERTIORARI

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THE INTEREST OF THE *AMICUS CURIAE* [1]

The Texas Law School Deans are an informal group of current deans representing private and public law schools in Texas: serving as Deans are Dean Brad Toben, Baylor University School of Law; Dean Nancy Rapoport, University of Houston Law Center; Dean Bill Piatt, St. Mary's University School of Law; Dean John Brittain, Thurgood Marshall School of Law at Texas Southern University; Dean W. Frank Newton, Texas Tech University School of Law; Dean Richard Gershon, Texas Wesleyan University School of Law.[2] These Deans meet with each other in connection with matters of mutual interest and concern. Recent meetings of these Texas Law School Deans have been with the American Bar Association Consultant on Legal Education and with the Board of Bar Examiners of the State of Texas. The Texas Law School Deans have direct knowledge about the impact of the ruling in *Hopwood v. Texas* on their respective law schools and its affect on legal education in Texas. 236 F.3d 256 (5th Cir. 2000), *petition for cert. filed* (U.S. April 17, 2001) (No. 00-1609); *see also Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding the University of Texas School of Law's affirmative action admissions policy was a violation of the United States Constitution's Equal Protection clause).

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[1] Letters from each party consenting to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part. The only entity that made a monetary contribution to the preparation or submission of this brief other than the Texas Law School Deans was the Texas Tech Law School Foundation, which provided funds for the printing costs.

[2] Dean Bill Powers of the University of Texas School of Law is a party to the suit in his capacity as Dean and therefore has not joined on this brief, although he personally supports the position of his colleagues.

SUMMARY OF ARGUMENT

The existence of an unbridgeable split of authority on the application of the Equal Protection Clause to legal education institutions places Texas law schools in a position of growing peril because diversity is harder to maintain at Texas law schools than at law schools in other states. Many educators believe that diversity is an essential ingredient to effective legal education. Certainly many students believe that diversity is important to legal education, and Texas legislators have repeatedly admonished Deans of Texas's public law schools to increase diversity. As long as *Hopwood* applies only to Texas law schools there will not be an equal application of the Constitution's "equal protection" clause.[3]

Producing new lawyers and judges is the primary charge of law schools. Collectively, lawyers and judges comprise the third branch of government. The existence of an unbridgeable split of authority on the application of the Equal Protection Clause to law schools places Texas's third branch of government in a politically perilous position. A reasonably diverse bench and bar is essential if the State of Texas is to nurture truly representative government in the 21st Century. A majority of Texas lawyers graduate from Texas's law schools. The future of the legal profession in Texas, and with it the future of democracy in Texas, is tied to the ability of Texas law schools to enroll reasonably representative student bodies. Unequal application of the Constitution's "equal protection" clause to admissions in Texas law schools places Texas's third branch of government in a position of growing political peril because diversity is harder to maintain in Texas than elsewhere.

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[3] Recently a similar decision was rendered against the University of Michigan Law School under *Grutter v. Bollinger*, 2001 WL 293196 (E.D. Mich. 2001) but was subsequently stayed by *Grutter v. Bollinger*, 2001 WL 327822 (6th Cir. 2001).

ARGUMENT

I. THE EXISTENCE OF AN UNBRIDGEABLE SPLIT OF AUTHORITY ON THE APPLICATION OF THE EQUAL PROTECTION CLAUSE TO LEGAL EDUCATION PLACES TEXAS LAW SCHOOLS IN A POSITION OF GROWING PERIL BECAUSE DIVERSITY IS HARDER TO MAINTAIN.

Whether or not the plurality opinion of Mr. Justice Powell in *Regents of Univ. of Cal. v. Bakke* ever commanded a majority, it was openly relied upon by a large number of universities and law schools. 438 U.S. 265 (1978). Only within the last year has a single district court reached a conclusion in line with *Hopwood*. *See Grutter*, 2001 WL 293196 (E.D. Mich. 2001). In 48 states, the Powell plurality of *Bakke* defines equal protection as was recently confirmed by the United States Court of Appeals for the Ninth Circuit in *Smith v. Univ. of Wash., Law Sch.* 233 F.3d 1188 (9th Cir. 2000).[4] In 48 states, using race as a factor in admissions decisions is permitted, but not in Texas under *Hopwood*. This current constitutional divide cannot be bridged absent a decision by this Honorable Court, and pending such a decision Texas law schools will continue to suffer.

The racial diversity of a student body is deemed to be an essential ingredient by many legal educators and is an element to be considered in accreditation by the American Bar Association and for membership in the Association of American Law Schools. *ABA Standards for Approval of Law Schools*, S 210-11 (1999); *Bylaws of the Association of American Law Schools* § 6-4 (2000), *at* http://www.

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[4] In California and Washington affirmative action policies applicable at public institutions were withdrawn after propositions calling for the abolition of affirmative action were passed and statutorily codified. CAL. CONST. Art. I, § 31(a); WASH. REV. CODE ANN. § 49.60 (West 2000).

aals.org/bylaw.html. Many students believe that diversity is important to legal education and elect to attend law schools where such diversity exists. Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 Calif. L. Rev. 2241, 2249 (2000). Law schools in Texas have been asked to report to the Texas Legislature on racial diversity, and pubic law schools that depend on state funding are expected to enroll student bodies reasonably representative of the citizenry of the State. According to the last national census, Hispanic/Mexican American Texans are the fastest growing racial group in the State. U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA; U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING (showing that a comparison of the 1990 and 2000 census reveals that the Hispanic population in Texas has increased from 25% to 32 % of the total population). But law school enrollments in Texas do not show a similar growth. Information provided by the Texas Higher Education Coordinating Board (May 14, 2001) (on file with Paul Grubb, Director of Access and Equity for the Texas Higher Education Coordinating Board) (showing that Hispanic enrollment in Texas law schools has declined from 11.5% in 1992 to 10.7% in 2000 and that it peaked at 11.9% in 1996, the year the United States Court of Appeals for the Fifth Circuit decided *Hopwood*). African Americans are also underrepresented at Texas law schools, even though enrollment at the Thurgood Marshall School of Law at historically black Texas Southern University helps compensate for losses suffered at other Texas law schools. *Id.*; U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA; U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING.

Law schools in 48 states can and do admit students while taking race into account. Law schools in 48 states can and do offer scholarships to students while taking race into account. It is therefore clear why minority enrollment is up for all

American law schools but down in Texas since *Hopwood* was decided. Information provided by the Texas Higher Education Coordinating Board (May 14, 2001) (on file with Paul Grubb, Director of Access and Equity for the Texas Higher Education Coordinating Board); U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA; U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING. This Honorable Court should grant certiorari to insure that there is equal application of the Constitution's "equal protection" clause to all law schools.

II. THE EXISTENCE OF AN UNBRIDGEABLE SPLIT OF AUTHORITY ON THE APPLICATION OF THE EQUAL PROTECTION CLAUSE TO LEGAL EDUCATION PLACES TEXAS'S THIRD BRANCH OF GOVERNMENT IN A POSITION OF GROWING PERIL BECAUSE DIVERSITY IS HARDER TO MAINTAIN.

The current disposition of the affirmative action issue creates an unbridgeable split of authority between *Bakke* and *Smith*, on the one hand, and *Hopwood* and *Grutter* on the other. 48 states follow *Bakke* and *Smith*. Texas hews to a different application of the Equal Protection Clause. This difference places Texas's third branch of government in a position of political peril since a reasonably diverse bench and bar is essential if the State of Texas is to nurture truly representative government in the 21st Century.

Of course even if the population is more racially diverse in Texas and less diverse in Texas law schools, it does not automatically follow that the bench and bar will be less diverse unless the majority of Texas lawyers graduate from Texas law schools. Thus, the pivotal question is where do lawyers admitted to the bar in Texas go to law school? More specifically the question is where do recent bar applicants go to law school since diversity in bar admissions has grown dramatically in recent years. Ten years ago 84% of all

lawyers admitted to practice in Texas that year graduated from Texas law schools. Information provided by the State Bar of Texas (May 16, 2001) (on file with Carol Cannon, Membership Office). Five years ago 82% of all lawyers admitted to practice in Texas that year graduated from Texas law schools. *Id.* In 2000 71% of all lawyers admitted to practice in Texas graduated from Texas law schools. It is clear that diversity in the third branch of government in Texas is largely dependent on diversity in Texas law schools. *Id.* This can only be achieved if Texas law schools are allowed to operate under the same constitutional guidelines as law schools in other states.

CONCLUSION

Permitting the unseemly existence of an unbridgeable split of authority on the application of the Equal Protection clause to legal education threatens Texas law schools and the third branch of government in Texas. Therefore this Honorable Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*.

Respectfully submitted,

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No. 00-1609

IN THE

Supreme Court of the United States

STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AMERICAN COUNCIL ON EDUCATION, THE LAW SCHOOL ADMISSION COUNCIL AND THE GRADUATE MANAGEMENT ADMISSION COUNCIL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The State of Texas and related educational entities and officials present two questions in their Petition for a Writ of Certiorari. This *amicus* brief, however, addresses only part of the first question. More specifically, the question presented here is whether, in conflict with the Ninth Circuit and prior Supreme Court precedent, the Fifth Circuit erred in holding that the Fourteenth Amendment categorically prohibits state educational institutions from considering an applicant's race and/or ethnicity in order to obtain a diverse student body.

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INTEREST OF *AMICI CURIAE*

With the written consent of all parties, the Association of American Law Schools ("AALS"), the American Council on Education ("ACE"), the Law School Admission Council ("LSAC") and the Graduate Management Admission Council ("GMAC") respectfully submit this brief as *amici curiae* in support of the Petition for a Writ of Certiorari.[1]

AALS is a non-profit educational organization whose members consist of 164 ABA-approved law schools. AALS' primary mission is "the improvement of the legal profession through legal education." To that end, AALS bylaws require, among other things, that AALS members seek to have a "faculty, staff, and student body which are diverse with respect to race, color and sex." AALS Bylaw 6-4.c. Similarly, AALS' *Statement on Diversity, Equal Opportunity and Affirmative Action* emphasizes AALS' commitment to "equality of opportunity and diversity" and seeks "to increase the number of persons from underrepresented groups in law schools, in the legal profession and in the judiciary." AALS strongly believes that "broadening the boundaries of inclusiveness of American institutions is economically necessary, morally imperative, and constitutionally legitimate." *Id.* Consistent with that belief, most AALS member institutions have some form of a race-conscious admissions program.

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1. Counsel for AALS, ACE, LSAC and GMAC hereby confirm that they wholly authored this brief and that no person or entity other than AALS, ACE, LSAC and GMAC has made any monetary contribution to the brief's preparation or submission. Counsel for Petitioners and two of the Respondents have filed letters with the Court granting permission for all interested *amici* to file briefs in this case. The remaining necessary consent letter is being lodged herewith.

ACE is a non-profit educational association whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. Since its founding in 1918, ACE has sought to promote the highest standards in all aspects of higher education. As a leading participant in higher education affairs, ACE seeks to advance the interests of all members of the academic community, including students and the educational institutions themselves. ACE is dedicated to the principle that a strong higher educational system is the cornerstone of a democratic society. In furtherance of this principle, ACE supports diversity as a means of "enrich[ing] the educational experience," "promot[ing] personal growth," "strengthen[ing] communities and the workplace," and "enhanc[ing] America's economic competitiveness." *See* "On The Importance of Diversity in Higher Education," *The New York Times* A27 (Apr. 24, 1997). ACE is committed to helping its members "reach out and make a conscious effort to build healthy and diverse learning environments appropriate to their missions." *Id.*

LSAC is a nonprofit corporation whose members consist of 199 law schools in the United States and Canada. Founded in 1947, LSAC's mission is to coordinate, facilitate and enhance the law school admissions process. Through LSAC, law schools receive a variety of centralized services, such as the Law School Admission Test ("LSAT") and the Law School Data Assembly Service ("LSDAS"), which assist individual law schools in their admissions processes. LSAC conducts and funds extensive research on the LSAT, law school admissions, and other aspects of legal education, and has a longstanding commitment to ensuring equal access to legal education for members of minority groups. LSAC also participated as *amicus curiae* before the United States Supreme Court in *Regents of Cal. v. Bakke*, 438 U.S. 265 (1978).

Formed in the 1970's as a supporting organization for business schools, GMAC now has more than 135 university business school members. Among other activities, GMAC develops and administers the Graduate Management Assessment Test ("GMAT"), which is used by counselors and admission officers as one predictor of academic performance in graduate management schools. GMAC also conducts educational research, provides information to prospective students about business and management education, and provides other services to graduate schools of business. GMAC is committed to promoting the highest standards of professional business practices and to creating broad access to graduate management education. Consistent with these commitments, GMAC has undertaken several diversity initiatives, including the "Minority Summer Institute," "Destination MBA," "The PhD Project," and the "Diversity Pipeline Alliance." Through these initiatives, GMAC strives to increase the diversity of individuals who are seeking MBA or business doctorate degrees. One of GMAC's goals is to make graduate business education and degrees more available to historically underrepresented groups.

Collectively, AALS, ACE, LSAC and GMAC represent a significant percentage of the undergraduate and graduate academic institutions in this country. Based upon many years of first-hand experience, these institutions are convinced that student diversity is absolutely essential to the continued legitimacy and vibrancy of higher education. The Fifth Circuit's decision in *Hopwood* is fundamentally at odds with the missions of AALS, ACE, LSAC and GMAC as well as the admissions programs of most of their members. In light of this tension, and the legal conflict that *Hopwood* creates, the Court should grant Texas' petition to clarify the state of

the law and establish certainty within the academic community. At stake is the very future and vitality of America's higher education system.

STATEMENT OF THE CASE

Cheryl Hopwood, Douglas Carvell, Kenneth Elliot and David Rogers each sought admission to the University of Texas School of Law in 1992. When their admissions were denied, they brought a lawsuit against the University of Texas and several other entities and individuals alleging violations of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Each plaintiff claimed that he or she was denied admission because the School of Law's admissions program granted preferences to African-American and Mexican-American applicants. *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994).

After an eight-day bench trial in 1994, the district court concluded that *Regents of Cal. v. Bakke*, 438 U.S. 265 (1978), controlled the appropriate Fourteenth Amendment analysis. Applying *Bakke*, the court held that the law school's use of racial preferences for the purpose of achieving a diverse student body and to overcome the present effects of past discrimination served a compelling state interest. *Hopwood*, 861 F. Supp. at 569-73. Nonetheless, the court concluded that the law school's use of separate admissions procedures for African-Americans and Mexican-Americans was not narrowly tailored to achieve these compelling interests. *Id.* at 578-79. Because the law school had eliminated the perceived infirmity of its 1992 admissions program, however, the court declined to enter any injunctive relief. *Id.* at 582. The court also found that none of the plaintiffs would have been admitted to the law school even under a constitutionally permissible admissions process. *Id.* at 580-82. The court therefore awarded only declaratory relief. *Id.* at 582.

The court of appeals reversed, holding that the law school's use of racial preferences served no compelling state interest under the Fourteenth Amendment. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) ("*Hopwood II*").[2] In reaching this conclusion, the Fifth Circuit discounted *Bakke* because it felt that there was no majority holding on the compelling nature of diversity as a government goal and that, in any event, *Bakke* had been implicitly overruled by subsequent Supreme Court cases. *Hopwood II*, 78 F.3d at 944-45. Stopping short of issuing a permanent injunction, the court of appeals admonished the law school that it could not take race into account in admissions for the purpose, among other things, of "obtaining a diverse student body" or "remedying the present effects of past discrimination by actors other than the law school." *Id.* at 955. The *Hopwood II* panel then remanded the case back to the district court to apply a different burden of proof to the question of whether the plaintiffs would have been admitted to the law school under a color-blind admissions process. *Id.* at 955-57. A sharply divided appellate court denied rehearing *en banc* (*Hopwood v. Texas*, slip op. Nos. 94-50569, 94-50664, 1996 U.S. App. Lexis 9919 (5th Cir. Apr. 4,1996)), and this Court denied certiorari (*Hopwood v. Texas*, 518 U.S. 1033 (1996)).

On remand, the district court found that even applying a more exacting burden of proof, the law school prevailed in showing that none of the plaintiffs would have been admitted under a color-blind admissions process. *Hopwood v. Texas*, 999 F. Supp. 872, 879 (W.D. Tex. 1998). The court therefore

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2. The court of appeals had earlier affirmed the district court's denial of intervention for certain minority rights advocacy organizations. *See Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994) ("*Hopwood I*"). This aspect of the case is not at issue here.

awarded only nominal damages and attorney's fees. *Id.* at 923-24. The court also entered a sweeping injunction prohibiting "the University of Texas School of Law and its officers in their official capacity . . . from taking into consideration racial preferences in the selection of those individuals to be admitted as students at the University of Texas School of Law." *Id.* at 923. Both sides appealed.

In considering the case for a second time, the Fifth Circuit repeated and reaffirmed its holding that the University of Texas School of Law may not justify ***any*** consideration of race in admissions based on the desire to have a racially and ethnically diverse student body. *Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000) ("*Hopwood III*"). In so holding, the court of appeals explicitly recognized that its failure to follow *Bakke* placed it in direct conflict with a recent decision from the Ninth Circuit. *Id.* at 275 n.66. Nonetheless, the Fifth Circuit steadfastly maintained that while "[s]ome may think it imprudent for the *Hopwood II* panel to venture into unchartered waters by declaring the diversity rationale invalid, . . . the panel's ruling on diversity did not conflict directly with controlling Supreme Court precedent." *Id.* at 275. The court of appeals reaffirmed the *Hopwood II* panel's further holding that the Fourteenth Amendment also prohibited the law school from considering its applicants' race in order "to eliminate any present effects of past discrimination by actors other than the law school." *Id.* at 272. Affirming the district court's denial of actual damages to any of the plaintiffs, the Fifth Circuit then reversed the district court's broad injunction largely because it lacked the necessary factual and legal predicate. However, the court also noted that the injunction went beyond the holding of *Hopwood II*. *Id.* at 276-77. Pursuant to *Hopwood III*, therefore, an academic department within a state

educational system is foreclosed from considering race in its admissions process except for the very limited purpose of remedying demonstrable past discrimination specifically practiced by that department.

REASONS FOR GRANTING THE WRIT

Educators have long recognized that one of their missions in higher education is to produce broadly educated individuals who are prepared to become future leaders and good citizens within the context of an increasingly multi-cultural society. In fulfillment of this mission, colleges, universities and professional schools have sought to create a diverse and varied learning environment for their students. Most higher educational institutions have acknowledged that race and ethnicity must play a limited but critical role in the creation of this environment. As a result, almost all of these institutions have some form of a race-conscious admissions program. The petition presented by the University of Texas and related entities raises fundamental questions concerning the legality of such programs and implicates issues of academic freedom and the First Amendment. Given academia's firm conviction that diversity on campuses is vital to an informed and responsible student body, as well as a healthy democracy, the question of what steps are constitutionally permissible to achieve such diversity lies at the very core of public higher education's mandate. The widespread use of race-conscious admissions programs to promote diversity underscores the national significance of this issue and the need for clarification and guidance from this Court.

Indeed, whether the Fourteenth Amendment allows public educators to consider race and ethnicity in their admissions processes in order to create a diverse student body

has vexed the lower courts ever since this Court handed down its fragmented decision in *Bakke*. Since *Bakke*, few courts have been willing to tackle the issue directly. Recently, however, two circuits have taken wholly conflicting stands on the matter. While the Ninth Circuit has held that the constitution allows public law schools to consider race or ethnicity in their admissions processes in order to promote diversity in their student populations, the Fifth Circuit has reached the opposite conclusion. District courts in other circuits have likewise splintered over the meaning and import of *Bakke* and the constitutional limits on diversity in higher education. The Court should grant the University of Texas' petition in order to resolve these conflicts and create a uniform body of law in this critical area.

I.

THE PETITION PRESENTS A CONSTITUTIONAL ISSUE OF GREAT NATIONAL IMPORTANCE

A. Race Is A Critical Component In Most Admission Programs For Higher Education

Whether an institution of higher education may ever consider race or national origin as a factor in its admissions process in order to enroll a diverse student body has profound implications for the entire academic community. Educators have held diversity in high esteem for more than a century. N. Rudenstine, *The Uses of Diversity*, 98 The Harvard Magazine 48, 49 (1998).[3] As early as the mid-nineteenth century, diversity was recognized as a necessary component

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3. Counsel for *amici* would be happy to make any book or article cited in this brief available to the Court.

of the education of citizens in a heterogeneous democracy. *Id.* at 50. By the end of the nineteenth and the beginning of the twentieth centuries, diversity in education became a more explicit goal. *Id.* at 50-51. As the nation matured in complexity, this vision of diversity grew to include students of different races, religions and skin colors. *Id.* at 55.

"[M]uch of the point of education is to teach students how others think and to help them understand different points of view — to teach students to be sovereign, responsible, and informed citizens in a heterogeneous democracy." A. Amar & N. Katyal, *Bakke's Fate*, 43 U.C.L.A. L. Rev. 1745, 1774 (1996). In this respect, diversity in education serves unique and special purposes not found in other social sectors. *See* Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 Harv. L. Rev. 1357, 1358, 1366-73 (1996) ("*Evidentiary Framework for Diversity*") (arguing that in examining the value of diversity in higher education, "courts should consider the unique nature of diversity in education and the protection afforded academic [judgment]"); J. Alger, *The Educational Value of Diversity*, 83 ACADEME 20 (Jan/Feb. 1997) (diversity serves "as a controlled microcosm previewing the larger society and working world into which the student will graduate"). As one Harvard University President has noted, "diversity is not an end in itself, or a pleasant but dispensable accessory. It is the substance from which much human learning, understanding, and wisdom derive. It offers one of the most powerful ways of creating the intellectual energy and robustness that lead to greater knowledge." *Evidentiary Framework for Diversity*, 109 Harv. L. Rev. at 1372-73 (quoting *N. Rudenstine, Harvard Univ., The President's Report 1993-95*).

In considering who will not only meet the academic standards set by the institution, but will also materially contribute to the overall educational process, most higher educational institutions have never considered "merit" to be solely a function of "quantifiable criteria." W. Bowen & D. Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, at 26 (1998) ("*The Shape of the River*"). Thus, while the vast majority of American university, graduate and professional schools rely primarily on standardized test scores and college grade point averages to determine admissions, they have never used such measures exclusively. *See, e.g.*, L. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1, 16-17 (1997) ("*The Threat to Diversity in Legal Education*") (along with lower-scoring minority applicants, lower-scoring white applicants with certain attributes are also given special consideration in the law school admission process). Instead, selective schools generally end up with a very large group of applicants who are deemed capable of doing good work and whose admission will depend on a variety of factors, including, perhaps, an individual's race. *See, e.g., Harvard College Admissions Program*, attached as Appendix to Justice Powell's opinion in *Bakke*, 438 U.S. at 321; *Smith v. University of Wash. Law Sch.*, 233 F.3d 1188, 1192 (9th Cir. 2000), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Feb. 21, 2001) (No. 00-1341); *Hopwood*, 999 F. Supp. at 879–81.

The educational organizations participating as *amici curiae* in this case represent a vast segment of higher education. *See supra*, pp. 1-3. It is the experienced opinion of the *amici* and their members, as well as the opinion of

numerous other educational institutions, that achieving racial and ethnic diversity in higher education is a social imperative. *Cf. Gratz v. Bollinger*, 122 F. Supp. 811, 823 (E.D. Mich. 2000) (noting the abundance of *amici* who concur "that diversity results in a richer educational experience for students").[4] The widespread consideration of race and ethnicity in higher education admissions processes not only underscores the value educators feel diversity plays in higher education, but also highlights the critical importance of the constitutional issue before the Court.

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4. In concluding that racial and ethnic diversity serves an important educational purpose, educators fully embrace the notion that not all members of a particular race or ethnic group think alike. *The Educational Value of Diversity*, 83 ACADEME at 21. Indeed, this is part of the educational point that diversity makes. The fact that some individuals from the same racial or ethnic background may not share a common viewpoint is itself a valuable lesson — and a lesson to be learned by every student regardless of his or her race or background. *Id.*; *see also The Shape of the River* at 280 ("The black student with high grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx"); *Bakke*'s Fate at 1778 (with a diverse student body, white students learn from black students and vice-versa). Moreover, it is a reality of American society that race almost always affects an individual's life experiences and perspectives, and, therefore, what one brings to a learning environment. Note, *The Wisdom and Constitutionality of Race-Based Decision-Making in Higher Education Admissions Programs: A Critical Look at Hopwood v. Texas*, 48 Case W. Res. L. Rev. 133, 161 & n.171 (1998) ("*A Critical Look at Hopwood v. Texas*"). To deny this reality is to deny the history and social fabric of this country. *Id.*; *see also Evidentiary Framework for Diversity*, 109 Harv. L. Rev. at 1366-67 (noting that numerous studies and testimonials document the fact that "[i]n American society, race powerfully influences an individual's life experiences").

In holding that diversity can never justify consideration of race or ethnicity in admissions, the Fifth Circuit's holding has placed public higher education admissions programs in jeopardy, thereby creating uncertainty and apprehension within the academic community. But because educational institutions perceive racial and ethnic diversity as such an important educational goal, and because they are committed to preserving a reputation of accessibility, openness and inclusiveness, such institutions have continued to place paramount importance on diversity despite the uncertainty of the law. Indeed, in those states in which affirmative action is under attack, educators are seeking to find other, albeit less satisfactory, ways to achieve the goal of diversity and to make clear that their doors are still open to everyone. *See, e.g.*, B. Wildavsky, "What Happened to Minority Students?," *U.S. News & World Report* 28-29 (March 22, 1999) (in those states in which affirmative action is under attack, schools are trying to come up with other ways to boost minority enrollment; Texas, for instance, has implemented a rule accepting all in-state students for undergraduate admissions who graduate in the top ten percent of their respective high school class into the University of Texas system). And those states whose higher education admissions programs have not yet been challenged are likely to continue considering race in their admissions processes despite their exposure to costly legal battles. *Cf. Hopwood*, 999 F. Supp. 872, 923 ("outrageous requests for damages illustrate the significant financial risks federally funded state universities face when routine admission decisions are challenged . . . [and, m]oreover, the specter of large compensatory damages awards could threaten to compromise the integrity of the admissions process itself"). States are willing to face the threat of litigation because the alternative is so daunting. For instance, the year after the University of Texas School

of Law instituted an admissions policy that did not, in any way, consider race in the admissions process, African-American student admissions fell 83 percent and Mexican-American admissions fell 51 percent. *A Critical Look at Hopwood v. Texas*, 48 Case W. Res. at 133.

This precipitous drop cannot be wholly explained by a lack of minority law school applicants with high enough "objective" numbers. Minority applicants are also perceiving the institution as hostile or isolating for them, and therefore are applying elsewhere. *See* P. Applebome, "Universities Report Less Minority Interest After Action to Ban Preferences," *The New York Times* B12 (Mar. 19, 1997). The same drastic reduction in the number of minorities was noted in the University of California's three law schools and the University of Washington law school the year after state citizens voted to end race preferences there. *See* R. Whitman, *Affirmative Action on Campus: The Legal and Practical Challenges*, 24 J.C. & U. L. 637, 663 (Spring 1998) (in California, African-American enrollees dropped 63 percent, Native American enrollees dropped 60 percent, and Hispanic enrollees dropped 34 percent); J. Selingo, "Minority Applications Plummet at U. of Washington Law School," *The Chronicle of Higher Educ.*, (Today's News, Mar. 17, 1999) (available online) (number of African-American applicants dropped 41 percent; Filipino applicants dropped 26 percent; Hispanic applicants dropped 26 percent). While minority enrollment at these institutions has increased somewhat, *see Petitioners' Brief* at 19, it remains woefully inadequate and well below levels achieved using affirmative action. Studies projecting the effect of a race-neutral admissions process on minority enrollment in professional schools confirm that the alarming numbers in Texas, California and Washington are not aberrations.

See, e.g., The Threat to Diversity in Legal Education, 72 N.Y.U. L. Rev. at 15-16 (setting out study which concludes that of the 3,435 African-American applicants who were accepted to at least one law school to which they applied in 1991, only 687 would have been admitted if LSAT's and GPA's were the sole criteria for admissions).

Educators should not be forced into the Hobson's choice of fulfilling their missions of preparing students for life in a heterogenous society and risking significant litigation, or abandoning diversity as an institutional goal at the expense of the institution's integrity and reputation. Nor should educators be forced to invent imperfect proxies for race and ethnicity if a narrowly tailored race-conscious program designed to foster diversity would pass constitutional muster. Because the wholesale inability to consider race in higher education admissions programs portends a return to elite educational institutions which exclude minorities, the critical importance of this constitutional issue cannot be gainsaid. Higher education has a need, and the right, to know what the future holds for its public institutions. This Court should declare the state of the law so that, whatever the constitutional parameters might be, higher educational institutions can move forward and develop permissible, long-range admissions programs that maximize the admission of a diverse and an academically excellent student population.

B. The *Hopwood* Decision Implicates Academic Freedom And The First Amendment

American higher education has gained world prominence due, in part, to its autonomy and freedom from governmental interference. *The Shape of the River* at 287. This Court has long recognized that academic freedom is essential to

safeguard "[t]eachers and students [who] must always remain free to inquire, to study and to evaluate." *Keyishian v. Board of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (quotations and citation omitted). Justice Frankfurter, for example, acknowledged the historic independence of educational institutions and set out the "four essential freedoms of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and ***who may be admitted to study***." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added). Since *Sweezy*, this Court has often repeated its resolve to defer to educators exercising academic judgment in these areas. *See, e.g.*, *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973); *Board of Curators v. Horowitz*, 435 U.S. 78, 89-90 (1978); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

Consistent with this reasoning, Justice Powell recognized in *Bakke* that "a countervailing constitutional interest, that of the First Amendment," is implicated in connection with the right of universities "to select those students who will contribute the most to the 'robust exchange of ideas'. . . ." 438 U.S. at 313. Protecting the "robust exchange of ideas" follows from the First Amendment's protection of the "marketplace of ideas" (*Red Lion Co. v. FCC*, 395 U.S. 367, 390 (1969)), which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *Associated Press v. United States*, 326 U.S. 1, 20 (1945). As this Court has noted, "[the] college classroom with its surrounding environs" constitutes a "peculiarly" strong "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972).

Academia's collective wisdom counsels that racial and ethnic diversity serves an imperative educational purpose. By failing to recognize the compelling state interest in a racially and ethnically diverse student population, the Fifth Circuit has cast a shadow over academic freedom and the First Amendment, threatening academia's freedom to make autonomous decisions concerning who will best contribute to the educational process and "the robust exchange of ideas" on campuses. This petition therefore raises serious questions about the scope and role of academic freedom and the First Amendment in an Equal Protection analysis involving public educational institutions. Such weighty issues deserve this Court's attention.

II.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND WITH A DECISION FROM THE NINTH CIRCUIT

In *Bakke*, this Court was confronted with the legality of a medical school admissions program at the University of California at Davis. The Davis plan set aside a number of positions for African-Americans. *Bakke*, 438 U.S. at 274-75. In striking down the set-asides, the Court was extremely divided in its reasoning. Four justices held that the program was constitutional (*id.* at 325-26); four justices held that the plan violated Title VI and that the constitutional question need not be decided (*id.* at 411-12, 421); and one justice, Justice Powell, held that the particular admissions program at issue was unconstitutional but that other race-conscious admissions programs could survive constitutional scrutiny if enacted to assemble a diverse student body and if

race were only one of numerous factors favoring admission (*id.* at 311-19). Justice Powell's opinion garnered majority support in at least one important respect: five justices joined in holding that public higher educational institutions have "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320. Otherwise, the four justices who would have upheld the admissions plan at issue felt that Justice Powell's opinion did not go far enough. *Id.* at 324-26. As a result, Justice Powell's opinion sets out the narrowest grounds for upholding race-conscious admissions programs and, under the principles of judicial interpretation enunciated by this Court, it is therefore the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

This Court has never overruled *Bakke*. Indeed, Justice O'Connor indicated in a concurring opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986), that the *Bakke* Court had previously found that racial diversity constituted a compelling interest, at least in the higher education context. In addition, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 258 (1995), Justice Stevens noted in his dissent that the Court was not overruling that aspect of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which recognized that diversity "may provide a sufficient interest to justify [racial classifications]."

The Fifth Circuit discounted the *Marks* analysis and the opinions of Justices O'Connor and Stevens and held that it

was free to conclude that diversity is not a compelling state interest justifying the consideration of race in a state's admissions process. *See Hopwood III*, 236 F.3d at 272-75. Such a holding is unprecedented among the circuits. *See, e.g., Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 748 (2d Cir. 2000) (recognizing that the Fifth Circuit is the only appellate court since *Bakke* to have rejected diversity as a compelling interest); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704 (4th Cir. 1999) (same), *cert. dismissed*, 529 U.S. 1050 (2000); *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998) (same).

Recently, the Ninth Circuit reached the exact opposite conclusion. In *Smith*, 233 F.3d at 1200, the Ninth Circuit held that, under *Bakke*, diversity is a compelling state interest that allows admissions officers to consider, on some level, the race and ethnicity of their applicants. Thus, the conflict between the Fifth and Ninth Circuits is two-fold. First, these two circuits squarely disagree over the precedential value of *Bakke*. *See Hopwood III*, 236 F.3d at 275 n.66 (explicitly recognizing conflict over meaning of *Bakke*); *Smith*, 233 F.3d at 1200 n.9 (same). Second, the two courts also disagree on the central question of whether diversity can ever justify the consideration of race in a state's higher education admissions process. *Hopwood III* at 274; *Smith*, 233 at 1200-01.

The confusion among the courts does not end with the Fifth and Ninth Circuits. The district courts have also divided over the issue. At least two district courts have followed the reasoning of Fifth Circuit to conclude that *Bakke*'s diversity holding is non-binding and that diversity can never justify race-conscious admissions programs. *See, e.g., Grutter v. Bollinger*, slip op., No. 97CV75928-DT, 2001 U.S. Dist. Lexis

3256 at *66 (E.D. Mich. Mar. 27, 2001) (concluding that "*Bakke* did not hold that a state educational institution's desire to assemble a racially diverse student body is a compelling state interest); *Johnson v. Board of Regents of Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1369 (S.D. Ga. 2000) (concluding that Justice Powell's opinion in *Bakke* carries no precedential weight with respect to the issue of diversity). In contrast, at least one district court has agreed with the Ninth Circuit's holding. *See Gratz*, 122 F. Supp. 2d at 820. Among the circuit courts, several have avoided the *Bakke* debate altogether by assuming that diversity is a compelling state issue but striking down various admissions programs on other grounds. *See, e.g.*, *Wessmann*, 160 F.3d at 796 (assuming "diversity" is constitutionally permissible goal, middle/high school admissions program was not "narrowly tailored" to meet this goal); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 131 (4th Cir. 1999) (same with respect to elementary school admissions program), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle*, 195 F.3d at 705 (same with respect to kindergarten admissions).

Given these decisions, the vitality of *Bakke* is now squarely in dispute. Rather than allow the lower courts to continue to second-guess the meaning and status of *Bakke*, this Court should decide *Bakke*'s fate. Whether Justice Powell's opinion continues to have the force of law, or whether *Bakke* should be modified or overruled, is a decision which lies solely within the providence of this Court. Indeed, in considering the thorny issue of the place of race in a state admissions process, the courts themselves have repeatedly voiced the need for guidance from this Court. *See, e.g., Hopwood III*, 236 F.3d at 275 ("Some may think it was imprudent of the *Hopwood II* panel to venture into unchartered waters by declaring the diversity rationale invalid"); *Smith*, 233 F.3d at 1200 (Supreme Court must decide whether the *Bakke* opinion remains good law); *Eisenberg*, 197

F.3d at 131 (because Supreme Court has not decided whether diversity can be compelling state interest justifying consideration of race in admissions programs, court likewise declines to decide it); *Tuttle*, 195 F.3d at 705 ("Until Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest"); *Wessmann*, 160 F.3d at 796 (absent clear signal from the Supreme Court, court of appeals is "unprepared" to hold that "diversity is not a sufficiently compelling interest to justify a race-based classification"); *Grutter*, 2001 U.S. Dist. Lexis at *77 n.34 (acknowledging that the status of the *Bakke* opinion "has been the subject of much debate and disagreement"). The time is ripe for the Court to clarify this area of the law and to bring uniformity among the circuits.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, preferably to address all of the issues raised therein, but at a minimum, to resolve the issue of the ability of higher education to consider race in its attempt to foster diversity in its student population. The need for guidance is becoming increasingly apparent as more and more challenges are being mounted to race-conscious admissions programs and the courts continue to divide over the issue and over the precedential weight of *Bakke*. Only this Court can, and should, proclaim the meaning of *Bakke* and delineate the role of academic freedom and the First Amendment in a Fourteenth Amendment challenge to a public higher educational institution's decision on who it will admit to study at its campus. These issues are of extreme importance not only to the academic community but to society as a whole.

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(7)

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No. 00-1609

In The Supreme Court of the United States

STATE OF TEXAS, *ET AL.*,
Petitioners,

v.

CHERYL J. HOPWOOD, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Court should grant the petition. Respondents Elliot and Rogers join in petitioners' request that the Court grant certiorari, agreeing that the issues are of national significance and that the Court's long silence on the consideration of race in higher education has left conflict and confusion in the lower courts. *See* Elliot/Rogers Br. 1. Respondents Hopwood and Carvell, too, do not dispute the national significance of the issues presented or many of the divisions in the courts discussed in the petition. *See* Hopwood/Carvell Br. 2. For the most part, they devote themselves to defending the court of appeals's decision, without successfully explaining why the Court should not address these important issues. As the case presents issues of admitted national significance on which the lower courts are divided, this Court should decide them.

ARGUMENT

I. THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. The Conflict with *Bakke*. Respondents Hopwood and Carvell agree that *Bakke*'s holding was that

> "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of the Court per Powell, J.).

Although respondents recognize that in *Bakke* the Court held that it was improper to prohibit any consideration of race in admissions, they nevertheless insist that the Fifth Circuit's substantively identical judicial instruction somehow escapes *Bakke*. They claim that the court of appeals followed *Bakke*'s holding and ignored only its "rationales." Hopwood/Carvell Br. 13. But the court of appeals's refusal to follow *either* rationale in *Bakke* was necessarily a refusal to follow its holding. Unless *Bakke* is repudiated, one or the other of its rationales, or the two combined, justifies some limited consideration of race.

Respondents also contend that the Fifth Circuit's judicial instruction is consistent with *Bakke* because it rejects only four possible justifications for consideration of race in admissions. *Id.*, at 14. They improperly claim that the court of appeals "did not foreclose the use of race in all conceivable situations" and that "if the law school had itself engaged in past discrimination, the effects of which were presently being felt," the court would permit the law school to remedy those effects. *Id.* This saccharine description of the court of appeals's ruling does not cohere with reality. The

prohibited justifications comprised all the reasons why the law school might ever consider race in admissions and were plainly so understood in both *Hopwood II* and *Hopwood III*. There was no practical difference between the court of appeals's "judicial instruction" and the injunction barring any consideration of race.

Respondents also defend the Fifth Circuit by pointing to its acknowledgment in *Hopwood III* that the district court's injunction was so broad that it conflicted with *Bakke*. *Id.* That recognition, however, is irreconcilable with the core holding that the law school may not consider race for any of the four specified reasons. Moreover, it only highlights the disconnect between *Bakke* and the Fifth Circuit's decision and does not salvage the court of appeals's holding or represent an allegiance to *Bakke*.

Despite being presented with the law school's admissions policy, Pet. 23 n.3, respondents suggest that the law school aims to achieve only racial diversity and is at odds with Justice Powell's vision of multiple forms of diversity. Hopwood/Carvell Br. 16. The admissions policy makes clear that the law school values many sources of diversity, but because only racial diversity is systematically eliminated by the ordinary workings of the admissions process, race-conscious admissions policies have been utilized. *See* Br. *Amici Curiae* Ass'n of Am. Law Schools, *et al.* 2 (most AALS law schools have a race-conscious admissions program).

It cannot be realistically disputed that the Fifth Circuit has put the status of *Bakke* in controversy. *Only* this Court can tell the lower courts, the States, and educational institutions the status and meaning of *Bakke*.

B. The Conflict in the Lower Courts over Diversity. Respondents do not dispute that there is sharp disagreement in the lower courts over educational diversity as a compelling state interest. Hopwood/Carvell Br. 15. Both the Fifth and Ninth

Circuits have expressly recognized their conflict. Pet. 11. And two district courts within one district in Michigan have considered the same institution and reached directly opposite conclusions on the issue within a matter of months. Pet. 21. Courts are also in disagreement with the Fifth Circuit's holding that consideration of race is limited to remedial interests. *See* Pet. 11. Unable to deny the conflicts, Hopwood and Carvell try only to minimize them, emphasizing that many courts have decided cases on other grounds to avoid confronting the confused body of law on compelling interest. But abandoning the law on proper compelling interests only worsens the effect of the divisions by fixing conflict as the only reference point for States looking for guidance.

C. The Conflict over Remedying Past Discrimination and Preventing Racial Identifiability. Respondents do not deny the States' interest in remedying past discrimination. Instead they try to package the various effects of past discrimination presented by the law school as amorphous, untraceable "societal discrimination," which is not a valid justification for racial classifications. Hopwood/Carvell Br. i, 18-20. But, contrary to respondents' characterization, discrimination in Texas public education was *governmental* discrimination, and was not in the distant past, as they suggest. *See id.*, at 2, 20. Respondents are also simply wrong in their effort to relegate the facts on this issue to the broad category of "societal discrimination." Many Texas school districts had not reached unitary status when this case was tried in 1994. *Hopwood A*, 861 F.Supp. 551, 554 (W.D. Tex. 1994). In addition, respondents misrepresent the district court's findings in claiming that Mexican-American students never suffered *de jure* discrimination. *See id.*, at 554-55.[1]

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1. "Many of the school districts found to be operating dual systems of education were also found to practice official discrimination against black and Mexican American students." *Hopwood A*, 861 F.Supp., at 554. At the university itself, long after the *Sweatt* case, "Mexican American students were

Respondents ignore the real effects of past discrimination in denying a conflict with *United States v. Fordice*, 505 U.S. 717 (1992). The Fifth Circuit's holding that the State is confined to race-neutral admissions policies in its efforts to remedy the present effects of past discrimination and prevent *de facto* resegregation of the law school is at odds with *Fordice*. *See id.*, at 729. In addition, *Fordice* supports the systemic assessment of past discrimination, an approach refused by the court of appeals. *See id.*, at 727-28. Entrenched in an artificially segmented view of the source of past discrimination in Texas education, respondents offer on this point only repetitions of the Fifth Circuit's labeling of the evidence of past discrimination as "societal discrimination" and "historical fact." Hopwood/Carvell Br. 19. The facts of past discrimination are not, as respondents would have it, irrelevant. Ending racial identifiability at the law school remediates the racial identifiability of the applicant pool, which has resulted from the law school's and the university's past discrimination, as well as governmental discrimination elsewhere in Texas public education, and in turn, cures other continuing effects of past discrimination, especially minority communities' mistrust of the law school and the law school's status as a hostile environment for minority students.

Respondents do not dispute that the lower court decision squarely conflicts with *Geier v. Alexander*, 801 F.2d 799 (CA6 1996), in which the Sixth Circuit upheld consideration of race in law school admissions based on the continuing effects of earlier discrimination in the state's educational system. They attempt to temper the conflict with *Brewer v. West Irondequoit Central School District*, 212 F.3d 738, 745-46, 752-53 (CA2 2000), asking that *Brewer* be confined to its facts. *See* Hopwood/Carvell Br. 21 n.18. But the critical fact of that case, which held that the elimination of

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segregated in on-campus housing and assigned to a dormitory known as 'the barracks,' as well as excluded from membership in most university-sponsored organizations." *Id.*, at 555.

de facto segregation is a compelling interest, is the student body's racial identifiability. The only difference between the two cases sharpens the conflict—in *Brewer*, the racial identifiability was not linked to past discrimination.

II. THIS CASE PRESENTS CONSTITUTIONAL ISSUES OF GREAT NATIONAL IMPORTANCE.

All respondents agree that this case presents issues of serious and national significance. *Id.*, at 2; Elliott/Rogers Br. 1. The briefs of *amici curiae* confirm the importance of the issues for the nation's law schools and for institutions of higher education across America. *See* Br. *Amici Curiae* Texas Law School Deans; Br. *Amici Curiae* Ass'n of Am. Law Schools, *et al.* The proper role of race in admissions has obvious importance to both public and private colleges and universities around the country, and continued inconsistency in the courts is intolerable.

Nor do respondents dispute the significance of this case to states with formerly *de jure* segregated systems of higher education. Because these states operate under a variety of judicial decrees and desegregation plans, all designed to eliminate racially identifiable institutions of higher education, *see Hopwood A*, 861 F.Supp., at 555-56, questions about the relationship of race-conscious decision-making and desegregation efforts continue to be of critical significance in such states.

This case is also of great importance to the maintenance of selective admissions standards. Since the petition was filed, the Texas Legislature has enacted another well-intentioned law, now awaiting the Governor's signature, prohibiting professional and graduate schools from using a standardized test as the "sole criterion" or as "the primary criterion to end consideration of [an] applicant." Act of May 27, 2001, 77th Leg., R.S., H.B. 1641, §1; *see also* Pet. 19-20. These approaches inevitably erode the interest in academic excellence by reducing standards across the board for

all applicants, rather than for a small number of select applicants. Contrary to respondents' assertion, such legislation heightens the need for review because it would be far better for the quality of academic institutions to retain their ability to consider race among a variety of admissions criteria, together with standardized measures of academic merit, than to be forbidden them all.[2] Any method of avoiding resegregation that is not cognizant of race will inevitably affect considerably more seats in a class than a carefully designed race-conscious admissions policy.

III. This Case Squarely Presents Important Issues Not Squarely Presented by Other Cases.

Only this case squarely presents the issue of educational diversity and the equally important issue of whether remedying the effects of past discrimination is a compelling interest in the context of admissions to higher education. The Court denied certiorari in *Smith v. University of Washington*, 69 U.S.L.W. 3593 (U.S. May 29, 2001) (No. 00-1341). Respondents claim that the two University of Michigan cases present past discrimination issues. Hopwood/Carvell Br. 22. But only intervenors, not the university, have defended on the ground of remedying past discrimination in those cases, and the intervenors argue only societal discrimination. Pet. 21-22 & n.21. And with Michigan not having Texas's history of *de jure* segregation, this case remains a unique presentation of both the compelling interest questions of educational diversity and past discrimination.

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2. Respondents suggest that such statutes are an extra-record matter requiring factual assessment. Hopwood/Carvell Br. 12 nn.10-11. The statutes are public record, and their restriction of meritocratic admissions criteria appears on their face.

IV. THE COURT OF APPEALS'S JUDICIAL INSTRUCTION SHOULD NOW BE REVIEWED.

Petitioners seek review of the court of appeals's judicial instruction that prohibits the law school from using race in any fashion in admissions decisions. Respondents recognize that this instruction is binding on the law school and, as such, is reviewable by the Court. *See* Hopwood/Carvell Br. 26 n.21 ("respondents here achieved 'forward-looking' relief from the court of appeals in 1996 inasmuch as the *Hopwood II* opinion has compelled the law school to adhere to a race-neutral admissions policy"); *see also id.*, at 10, 25, 28. It is this forward-looking relief that petitioners ask the Court to review.

Although respondents emphatically agree that "the law school is bound by the *Hopwood II* decision," *id.*, at 26, that "form is not dispositive," and that an order "with all the practical consequences of an injunction" will support jurisdiction, *id.*, at 11 n.9 (quoting Pet. 26), they claim that a decision by the Court in this case would be "an advisory opinion," *id.*, at 1, 23.

Petitioners do not seek an advisory opinion. Petitioners seek review of a judicial instruction that remains in place as "'a clear directive from the federal courts,' that was 'stated, three times with all the precision of an injunction or a declaratory judgment.'" *Id.*, at 10 (quoting Pet. 22, 24). Because that prohibition is in place, and because the law school has made clear its desire to resume consideration of race in some limited form in admissions decisions, *see* Pet. 23, the case continues to be animated by a live issue. For respondents, the only way petitioners could create a cognizable controversy is to openly defy the Fifth Circuit, a scenario difficult to imagine and hardly appropriate to encourage in order to invigorate the "liveness" of a controversy. It is sufficient that "the law school is bound" by the Fifth Circuit's instruction, Hopwood/Carvell Br. 26, and that it would resume consideration of race if the judicial instruction were lifted. This commitment by the

law school is in direct contrast to the University of Washington case, in which the State of Washington abandoned its admissions policy by state law. *See Smith*, 69 U.S.L.W. 3593 (denying certiorari).

Respondents bottom much of their opposition on their contention that there is no contested admissions policy in the case. Hopwood/Carvell Br. 24. But it is only the Fifth Circuit's judicial instruction that prevents the existence of a specific policy. Just as citizens need not risk arrest and prosecution to obtain a ruling on a claimed constitutional right, *e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), the law school need not defy the Fifth Circuit to have its decision reviewed. In any event, the details of a particular admissions program would be necessary only if the petition presented an issue of least restrictive means.[3] But this case concerns compelling interest issues, and the Fifth Circuit has prohibited any use of race, no matter the means or details of implementation.[4]

Even as they claim the decision is not reviewable by the Court, respondents inconsistently assert that the Fifth Circuit's decision was fully reviewable in 1996 and that nothing has changed. *E.g.*, Hopwood/Carvell Br. 25 n.20. While implicitly acknowledging the continued reviewability of the Fifth Circuit's judicial instruction,

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3. Respondents interject an outside issue by claiming that the petition should be denied because the admissions program should fail the second aspect of the constitutional analysis, the narrowly tailored requirement. *See* Hopwood/Carvell Br. 23-24 n.19. That issue, however, is not presented by the petition nor was it decided by the Fifth Circuit.

4. The law school's desired policy is no mystery. The existing admissions policy is set out in the petition, Pet. 23 n.3, making clear that many factors will be considered along with race. Because of its strong commitment to academic excellence, the law school will implement the smallest possible racial preference consistent with reasonable diversity. The district court found that the law school has consistently reduced its degree of racial preference. *See* Pet. 5.

they assert that the previous denial of certiorari somehow commands a denial of this petition. But that is not the law, nor is it consistent with the Court's practice. *See* Pet. 23. Timing and questions for review are discretionary, and the Court has of course long preferred to review judgments after they reach the end of their road.

That *Hopwood II*'s "judicial instruction" serves as either an injunction or declaratory judgment, and is properly reviewable, is confirmed by *Hopwood III*'s award of attorneys' fees. Pet. 25-26. If the 1996 judicial instruction supports the fee award, it is indeed an appealable order. Respondents do not and cannot deny that the size of their fee award is predicated on the judicial instruction that petitioners ask the Court to review.

Respondents misread petitioners' point about their inappropriate attempts to insulate this case from review. Hopwood and Carvell claim that an injunction was irrelevant because they obtained a *de facto* injunction in *Hopwood II*. Hopwood/Carvell Br. 25-26. Rogers and Elliott assert that they do continue to seek an injunction. Elliott/Rogers Br. 1-2.[5] The critical principle, which none address, is that petitioners should not be bound by a judgment that is argued to have become unreviewable through no fault of their own. *See* Pet. 28-29.

CONCLUSION

The petition should be granted. Alternatively, the award of attorneys' fees should be summarily reversed and the court of appeals's "judicial instruction" should be vacated and remanded with instructions to dismiss or to enter a properly appealable judgment.

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5. This position is at odds with all four respondents' recent disavowal of a desire for injunctive relief in the district court. *See* Tr., pp. 4-5, Status Conference (W.D. Tex. Feb. 15, 2001) (copy of transcript has been lodged with the Court).

Respectfully submitted,

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